

The Bewitchment of Intelligence:  
Language and *Ex Post* Illusions of Intention

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## The Bewitchment of Intelligence: Language and *Ex Post* Illusions of Intention

### ABSTRACT

Lawyers who negotiate and litigate over complex deals have an intuitive notion of the value of what they do in connection with the contract. The arguments around technical contract language often are a lawyers' game; in most cases, what is clear would have been clear on a handshake; and what is tightly negotiated bears only a random relationship to the areas of future dispute. If they happen to have drafted tight and clear language around the particular matter in dispute, it is as much luck as foresight. Thereafter complex agreements can have binding effect for years, but most of the relationship transpires without explicit reference to the contract. The problem to which much of contract interpretation scholarship is directed arises only when there is a significant disagreement not resolvable by non-legal means. If the contract is not sufficiently clear on the subject so the parties agree on the outcome, or a court has an easy case, how do courts go about filling gaps that the parties simply did not address, or providing meaning in the present circumstance to words that do not unambiguously resolve the problem?

I want to suggest an answer I believe is intuitive to practitioners but may be provocative in the academy. The search for an illusive *ex ante* mutually intended meaning is a waste of time, as is worry about the ancillary problem of opportunism. The creation of the complex contract and its later interpretation in a difficult case of ambiguity are distinct events. If a previously negotiated term that is capable of being ambiguous nevertheless has a mutually understood meaning, it will be apparent at the time of the potential dispute, but in that instance there will be no dispute and no jurisprudence. If there truly is a dispute, however, there is no going back to a mutually intended meaning as of the time the contract was made, because the words only take on meaning at the time of their application to the circumstance. It follows that opportunism is a function of extra-legal morals and norms, and is not controllable by language that turns out to be disputable, if the parties choose to dispute it. The proper focus of courts, therefore, is a pragmatic resolution of disputes, and not a search for mutual intention.

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## The Bewitchment of Intelligence: Language and *Ex Post* Illusions of Intention

*Philosophy is a battle against the bewitchment of our intelligence by means of language.*<sup>1</sup>

### I. INTRODUCTION

Lawyers who negotiate and litigate over complex deals have an intuitive notion of the value of what they do in connection with the contract: the arguments around technical contract language are often a lawyers' game; in most cases, what is clear would have been clear on a handshake; and what is tightly negotiated bears only a random relationship to the areas of future dispute. In short, if the lawyers happen to have drafted tight and clear language around the particular matter in dispute, it is as much luck as foresight.<sup>2</sup> Reading most academic analyses of contracts is something like watching a single episode of the currently popular "arrest and trial" television shows. The parties negotiate and sign a contract, a dispute arises and is adjudicated in just several moments of thought.

Real-life commercial relationships cannot be so easily capsuled. Long-term supply agreements can run for years; a shareholders' agreement or LLC operating agreement will span the entire life of a business; a typical acquisition agreement may take weeks to negotiate, additional months to close, and thereafter its warranties, covenants and indemnification

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<sup>1</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953) (3d ed., G.E.M. Anscombe, trans., 2001), §109, at 40<sup>e</sup>.

<sup>2</sup> I began to think about this intuition more rigorously after Judge Richard Posner graciously allowed me the chance to comment on an early draft of his recent paper. Richard A. Posner, *The Law and Economics of Contract Interpretation* (November 2004), at 2, available at <http://ssrn.com/abstract=610983>. Judge Posner's thesis is there is a functional relationship between the *ex ante* costs the parties invest in deciding what the contract should say and the *ex post* costs (private and judicial) incurred if a dispute arises over interpretation. "The equation thus identifies the essential tradeoffs in analyzing the interpretation problem: the more the parties invest at the first stage, the lower the expected costs at the second stage." *Id.*, at 5. That conclusion seemed wrong based on the kind of work I have done for over a quarter century as both *ex ante* deal lawyer and *ex post* litigator. I recognize the danger of mistake in generalizing from my own experience, but it seems to me fairly typical of the experience of others who handle complex business deals. As discussed *infra* note 123, the irony is I am sympathetic to Judge Posner's implicit frustration with, and desire to resolve pragmatically, real disputes of contract interpretation.

provisions will govern the relationship of buyer and seller for years. The contract does not embody the relationship but reflects an aspect of it that was, at one time, dealt with in language meant to anticipate future events. Most of the relationship occurs without explicit reference to the contract. When there is a disagreement (and even then perhaps not), someone reaches for the file or the closing book to see what, if anything, was agreed on that particular subject.

Only then does the problem arise to which much of contract scholarship is directed. If the parties do not resolve the commercial issue by non-legal means, and if the contract is not sufficiently clear on the subject so the parties agree on the outcome, or a court has an easy case, how do courts go about filling gaps that the parties simply did not address, or providing meaning in the present circumstance to words that do not unambiguously resolve the problem? The academic literature on that subject is represented by formalists and contextualists, moralists and economists, those advocating complexity and those advocating simplicity, those seeking the intention of the parties and those seeking to impose a more objective market or societal intention, those presuming intention would be economically efficient and those believing an economically efficient result should simply be imposed.

There is a common thread, however, in any of the approaches to the resolution of hard cases of interpretation of contract language. Whether inherent in the words of the agreement or in the context of its formation, mutually intended meaning is presumed to have affixed as of the time of the making of the agreement. But by the time the dispute arises, the making of the agreement is ancient history, and, as often as not, the contract is mere text. The disputing parties are ascribing meaning to the words as of the time of their disagreement, and now looking for connections to the past by which they may persuade each other or a court of the erroneous interpretation proposed by the other.

The normative implication of the common understanding that meaning affixed when the contract was executed is *opportunism*, the gaining of an advantage (or avoidance of disadvantage) when later circumstances make the agreement less favorable than expected. Advocates of the sanctity of promise would decry opportunism on moral grounds; welfare maximization theorists worry that opportunism undercuts the value of a system of contract that encourages investment.

I want to suggest an alternative answer, which I believe is intuitive to practitioners but may be provocative in the academy. In a complex commercial relationship, when there is an *ex post* dispute over interpretation, particularly long after the parties negotiated the agreement, I question whether there was ever a mutual intention capable of determination either by the parties or a court. To the contrary, I contend the words of the agreement take on meaning only when a circumstance arises to which the words must be applied, and which is capable of becoming a dispute. What follows from that conclusion is a rejection of the idea that opportunism is a problem of any import to be addressed.

The argument goes as follows. The creation of the complex contract and its later interpretation in a difficult case of ambiguity are distinct events. If there is mutual intention at the time of a dispute over terms capable of a truly difficult case of disambiguation, it will be apparent at the time of the application of those terms to the relevant circumstance, but in that instance there will be no dispute and no jurisprudence. But, in that case, there is no going back to a mutually intended meaning as of the time the contract was made.

What the parties are then doing, whether individually or together, applying the rule of a contract to the present facts, is no different than a judge's application of a rule of law to a new case, a matter on which philosophers have written extensively. Is there a rule inherent in

previous cases which can be divined by induction and applied to the next case? The formalists say “yes.” The skeptics say “no,” relying on twentieth-century advances in the philosophy of language. Language (not just that which appears in a contract) is the means by which we structure our very interaction with the world and each other. Before we use it cognitively and reflectively, we use it reactively and responsively, obeying rules in a way that is not necessarily rational or cognitive. Moreover, analysis of language and judgment teaches us one cannot apply a scientific inductive rule to the use and meaning of words. Indeed, there is no rule for the application of a rule. So the rule-skeptics conclude there is no rule of law – there is no principle that can be induced scientifically from the prior case, and judges are largely unconstrained in the matters before them.

Strangely, the same debate has not transposed to questions of *ex ante* agreement and *ex post* interpretation of agreements. Whatever the approach, the current contract scholarship, even when it brushes up against this same problem of rule-induction, passes quickly to filling gaps and resolving ambiguities, without much further thought. I want to argue that rule of law and contract interpretation are the same. The process is an induction applied at the time of a dispute to a previously existing text (albeit one produced by the parties themselves and not a judge or legislature).<sup>3</sup>

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<sup>3</sup> In one instance, a scholar has posed almost precisely the question I will attempt to answer in this article. Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT L. REV. 29 (2001). Professor Hill also considers the often attenuated “correspondence between the express words of the contract and the actual relationship between the parties. . . .” *Id.*, at 30-31. She posits the use of language in a complex contract does several things in addition to (whether or not other than) creating a legally binding relationship: the words may signal beliefs of the parties, establish a “ritual” for the creation of a relationship, and provide “stage-setting” for an evolving relationship. *Id.*, at 56. She argues that complex contracts offer a “model of meaning sufficiently constrained by context – where ‘you know it [only] when you see it,’ but ‘you’ includes the relevant community.” *Id.* at 33 (footnotes omitted). While she deliberately passes on the question what meaning “is” and whether a satisfactory account of meaning is possible, her reference to the non-rational aspects of judging – i.e., knowing it when we see it, but being unable to articulate why – parallels the arguments about the limits of language I will make here. *Id.*, at 33 n.8.

How then do we explain the process by which we seem to be agreeing *ex ante* and disputing *ex post*? I contend the process of creating the contract *ex ante* is simultaneously an instance of non-cognitive and cognitive communication. We *do* think deeply about some of the specific words of our agreements at the outset, and sometimes we are lucky enough actually to anticipate a future circumstance. The pragmatic reality of much of the complex contracting that is later disputed suggests, however, there may be as much possibility as not there was no *ex ante* cognition around the words, and hence no *ex ante* meaning.

What happens later? Because there never was full cognition and intentionality in the creation of contracts (even where undertaken by sophisticated lawyers with relatively unlimited budgets), the potential dispute ripens only when the later circumstance arises. It is possible that the words will have a shared meaning and there will be no dispute. But it is also possible the two parties, having differing beliefs or self-interest, will first induce different statements of the rule from the contractual text, and then engage in competing hindsight analyses of the language, after the events have occurred to which the contract language is applied, and where there is some color to the positions of each side. Based on years of experience in dealing with these kinds of cases in practice, I contend the better insights derive not from traditional legal doctrines or economic theory looking to divine mutual intention and deter opportunism, but from philosophies around rule-induction (Kant), the use of words in language games (Wittgenstein), and the circumstances by which our use of language turns from non-cognitive communicative interaction to a cognitive discourse of argumentation and justification (Habermas).

The Langdellian science of law, as well as the cross-disciplinary social sciences brought to bear on law (primarily the insights of economic theory, whether based in welfare-maximizing rational actor assumptions or in more complex behavioral or institutional economics) all operate



on the assumption of a reflective use of language: a cognitive process in which the parties do something intentional to secure legal rights, or economic or strategic advantage in the future. In assuming that the process of creating agreement is cognitive and intentional, and in failing to consider the possibility it is not, all theories of contract interpretation err.

It is a pragmatic reality that the parties assess language, risk and cost at the time of the dispute, and almost every calculus of the possible result of a dispute is opportunistic in the sense of maximizing the present value of the past words. There are a number of conclusions we may begin to draw from this insight, the most significant of which is this: in a colorable dispute over the meaning of a contract term, it is futile to attempt to determine the *ex antea* intention of the parties, and the notion of opportunism as a legal issue is an illusion. Whether one acts opportunistically is a function of extra-legal morals and norms, and not controllable by disputable language, if the parties choose to dispute it. The proper focus of courts, therefore, is a pragmatic resolution of disputes, and not a search for mutual intention.

In Part II, I set the context of commonly understood doctrines of intention in the context of a complex and long-term contract relationship. In Part III, I review the relationship of prior decisions to present rulings in the jurisprudence of judge-made law. I explore three different assessments to judicial decision-making, all of which express skepticism as to the ability to induce a rule from prior cases: (a) the legal pragmatism first articulated by Justice Holmes; (b) Linda Meyer's analysis of the creative process of judicial decision-making (applying Kant's Critique of Judgments); and (b) rule-skepticism based on Wittgenstein's philosophy of language. In Part III, I make the leap from judicial rule-induction to private rule induction in order to understand what it really means to have agreed or disagreed about the terms of an agreement. I conclude that the disagreement arises only in the context of the present dispute.

First, I show that the making of the contract is both a cognitive and non-cognitive process that goes beyond mere “bounded rationality.” Second, I argue conflicting interpretations of the agreement by the parties are attempts to derive, on an *ex post* basis, inductive rules from the words of the contract that should have, had we been focusing on them at the time we contracted, dictated the result in a particular circumstance. Because this is precisely what we *cannot* do, by the very nature of words and language, then a meeting of the minds is a self-fulfilling conclusion. If the mutual intention is clear enough, there is no dispute to come before a judge (or the case is ridiculously easy and arises out of some motivation other than a real dispute over interpretation). If there is a dispute and the case is not easy, then there never was an *ex ante* meeting of the minds to divine. I then review contemporary contract theory, from the philosophy of promising to application of law and economics, in order to show that all of it is based on the same form of impossible rule-induction.

Finally, in Part IV, I speculate on some of the implications if my theory is correct. I suggest, even where there are agreed words, there is less *ex ante* meeting of the minds than one would expect, and even less agreement on the rule established by the *ex ante* words when *ex post* circumstances create the incentive for dispute. In short, all disputes are opportunistic, and controlling opportunism would mean controlling disputes, something I contend is beyond the power of human beings, much less the law they create.

## II. THE PROBLEM OF INTENTION OVER TIME

Others have observed that contracts documenting long-term relationships have a complex interrelationship with non-legal norms.<sup>4</sup> Long-term supply agreements, business acquisitions,

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<sup>4</sup> See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); David Charny, *Non-legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Stewart Macauley, *Law, Private Governance and Continuing*

relationships among owner-operators of partnerships, close corporations or limited liability companies, entrepreneur-venture capitalist relationships all involve interactions and transactions in which most of the flow of communication and commerce does not involve either lawyers or the underlying contract. The words of the contract are significant at the outset of the relationship when the parties (which, on each side, may be organizations or associations of multiple individuals not of a single mind) try to predict the most likely places they may have a dispute, and to lock in as a matter of promise some aspect of their relationship.<sup>5</sup> The words of the contract also become significant later, after a dispute arises and the normal channels of human or business interaction take place.<sup>6</sup> The parties pull the lengthy long-term supply agreement out of the file, or the bound closing book off the shelf, and attempt at that moment to determine what, if anything, they agreed would apply in this particular circumstance.

The rest of this article is devoted to this case, where there is a colorable disagreement about the application of the words of a complex agreement negotiated in the past to circumstance now first arising in the present. I contend that the attempt to divine mutually intended meaning from the original negotiation in this instance is misguided. Mutual intention, if at all, with respect to the application of these words to this circumstance only arises at the time of the

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*Relationships: An Empirical View of Contract*, 1985 WISC. L. REV. 465 (1985); Mark C. Suchman, *Contract as Artifact*, 37 LAW & SOC'Y REV. 91 (2003); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, (2000) (hereinafter "E. Posner, *Radical Judicial Error*").

<sup>5</sup> See Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 625n.77 (1997) ("Classical contract doctrine responds to a world in which autonomous human beings are deemed to negotiate with one another volitionally and more or less knowledgeably as adversaries who seek some level of cooperation. They enter into exchange transactions or long term relationships whose terms they are said to have bargained out, and from which each expects to gain, each entertains the possibility of opportunistic behavior and each understands the other to do the same. In that world, each party bears (and expects to bear) the cost of protecting himself or herself against opportunistic behavior by the other--by obtaining information from available sources (including the other), and by insisting upon or yielding protective covenants in exchange for other benefits.")

<sup>6</sup> Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003).

circumstance, and not when the contract was negotiated. Moreover, to worry about the ancillary problem of opportunism is a waste of time.

Let's examine the traditional way in which the law has dealt with the relationship between ambiguous or missing terms and the parties' intention. Intention has always been a significant object of inquiry because it is so closely tied to the various philosophies that are argued to underlie the state's enforcement of contractual obligations. Why we care about living up to one's promise may be based in notions of the sovereignty of will, private autonomy, fairness to promisees that rely reasonably, or upon economic efficiency, the thought that investment will not occur without reasonable and predictable enforceability of promises.<sup>7</sup> The common thread of all philosophies of contract is temporal: we want to have some sense in the present dispute what promise was made in the past.

The shape of the inquiry around intention in the interpretation of contract terms has changed as contract theory has developed. The formalist-contextual debate between Williston and Corbin is well-known. Williston did not care what the parties actually intended. "For Williston, the contract develops a life and meaning of its own, separate and apart from the meaning the parties attach to their agreement. 'It is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used.'"<sup>8</sup> The test for interpretation is ultimately objective: what would a reasonable person interpret the words to mean.<sup>9</sup>

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<sup>7</sup>JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (5<sup>th</sup> ed., ), at 11.

<sup>8</sup> *Id.*, at 154, quoting 4 WILLISTON ON CONTRACTS (3d ed. ), §613, at 577

<sup>9</sup> *Id.*, at 155. A court would be permitted to take evidence of subjective intent around the ambiguity. If the parties had conflicting understandings of a material ambiguous term, the interpretation would be based the meaning ascribed by the party who is justifiably unaware, or if both are blameless, but the term is ambiguous, the court could find there was no meeting of the minds, and hence no contract. *Id.*

Contextualists, like Corbin, on the other hand, would allow meaning, even with no obvious ambiguity, to be determined by facts and circumstances beyond the words of the agreement, and would permit subjective evidence of intended meaning either at the time of the making of the contract, or by a reasonable understanding of the language at the time of the dispute. “A contract exists in accord with the meaning the promisee could rely upon, provided the promisor had reason to foresee that the promisee had reason to attach this meaning.”<sup>10</sup>

Recent contract theory, as discussed in more detail below, continues the concern with the application of antecedent promises to present circumstances.<sup>11</sup> While the proposed rules of interpretation are far more complex – there are models for sophisticated business-business contracts, models under which parties select formalist or contextualist rules *ex ante*, and so on – there is a consistent assumption that the words of the agreement took on meaning at the time the contract was made. Not only is mutually intended meaning supposedly capable of being determined by a court,<sup>12</sup> it is that meaning which is philosophically or economically sacrosanct.<sup>13</sup>

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<sup>10</sup> *Id.*, at 156-57.

<sup>11</sup> See, e.g., Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1712 (1997) (advocating an inversion of the conventional hierarchy of interpretation under which “the parties’ intentions are the most important source for establishing their rights and obligations, and substantive default rules are almost an avenue of last resort”).

Cf. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995). Taking a critical studies approach, Professor Mooney catalogs a number of cases in which courts appear to be reverting to a classical or conceptual approach to contracts, one that emphasizes definitions, categories and syllogistic logic to the advantage of the economically powerful – banks, insurance companies, employers, sellers. *Id.* at 1134-35. He criticizes this as a pre-modern faith in the objectivity of language, and contends “[i]n general, American courts the past dozen years have moved noticeably away from the most fundamental theorem of contract interpretation, that the law should enforce the parties’ intention, toward a more abstract, disembodied inquiry, resembling, what should the parties have meant when they signed this form contract?” *Id.* at 1170.

<sup>12</sup> Eric Posner wants to answer the question why parties enter into contracts when it appears reasonable to assume, particularly in long-term or repeating agreements, courts are radically incompetent to determine what the parties intended by their agreement. He aptly describes the conundrum caused by with the abandonment of a formalistic approach to the parties’ intentions:

The formalist approach seems perverse: why should it matter if parties adhere to a form or not, when we really care about their intentions? If a party fails to dot an “i,” we shouldn’t let that tiny

Moreover, the logical progression is unassailable: if the words took on meaning at the time the contract was executed, and one party seeks to vary that meaning later or not to perform based on unanticipated or changed circumstances, then it is opportunistic behavior the law should discourage, either because it is immoral not to live up to one's promise, or because opportunism leads to economic inefficiency.<sup>14</sup>

It is that assumption of the temporal assignment of meaning that I challenge, but to do so, I need to detour from the law of contracts to the more general intersection of jurisprudence and the philosophy of language.

### III. RULE-SKEPTICISM AND JUDGE-MADE LAW

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omission prevent us from enforcing the contract. But this modern view assumes away the problem that form is intended to solve - the problem of determining the parties' intentions. It assumes that courts can determine the parties' intentions from context and common sense. If this assumption is correct, then courts should ignore form. But Holmes's and Hand's view makes sense under the assumption of judicial incompetence. Courts cannot read parties' intentions from context, so they must rely on the forms that the parties choose. There is no evidence for the modern conviction that judges can reliably determine intentions. And although courts are no longer as formalistic as they used to be, there is no reason to believe that this trend is desirable, that judges are more competent than they used to be, or that contracts are more complex, or that the old attitude was wrong. The modern view is based on an empirical hunch, and no more, and on this basis contract law has slowly shed some of its formal requirements.

E. Posner, *Radical Judicial Error*, *supra* note 4, at 770-71. I will come back to Posner's observations throughout this article, because his metaphors and allusions for contract litigation seem prescient to me.

<sup>13</sup> See Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541 (2003). I discuss this article in detail *infra* notes 74-87 and accompanying text.

<sup>14</sup> See Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WISC. L. REV. 323 (2004). I discuss this article in detail *infra* notes 90-97 and accompanying text. Eric Posner's thesis about opportunism is clear, though troublesome. He presumes everyone will cheat unless constrained. The constraints may come from non-legal norms, like reputation or friendship, and may well exist even in transactions among strangers, but opportunism will be the rule, unless there is a constraint. E. Posner, *Radical Judicial Error*, *supra* note 4 at 754-58. "Courts are not very good at deterring opportunistic behavior in contractual relationships, but parties are. This is why so much contractual behavior depends on reputation, ethnic and family connections, and other elements of nonlegal regulation, and not on carefully written and detailed contracts enforced by disinterested courts." *Id.* at 758. While I would like to believe that people are not by nature as opportunistic as Posner suggests, I do not contest that point. His thesis that is contract law serves to deter certain kinds of high-value opportunism, even assuming that the court is not competent to determine the parties' intention. *Id.*, at 762.

While there is little scholarship considering the philosophy of language in the context of the interpretation of agreements, there is far more addressing the use and meaning of words over time in the context of judge-made law. Whether the approach is legal pragmatism, application of Kant's Critique of Judgments to the moment a judge applies a rule to a set of facts, or critical theory skepticism over rule-induction based on Wittgenstein's philosophy of language, there is consensus that "old" formalism has largely been discredited. The law does not read off inexorably from the last case, and the context of the new decision will be important.

A. *Rule-skepticism and legal pragmatism*

Skepticism about the induction of past-made rules to present and future cases has a long history in jurisprudence. In *The Path of the Law*, Justice Holmes rejected the idea that logic proceeding from one case to another was the basis for judicial decisions:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for the determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.<sup>15</sup>

According to Holmes, that a particular decision flowed logically forward from the precedents is an illusion. You know the conclusion you want to reach intuitively, before you know why you

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<sup>15</sup> 110 HARV. L. REV. 991, 998 (1997), *originally published*, 10 HARV. L. REV. 457 (1897).

think it follows from a particular rule. Only then do you construct the logic backward to justify your selection of that rule.

The legal pragmatists of the twentieth century, carrying on Holmes' antiformalism, like their philosophical antecedents, believe knowledge is "contextual" (i.e., embodied in language, experience, culture and practice) and "instrumental" (i.e., meaningful only as a tool to solve real problems).<sup>16</sup> As a general statement, pragmatists employ a methodology toward resolution of legal issues that rejects the grounding of law in any single overriding value, doctrine or policy, set of principles.<sup>17</sup> They look to "intersubjective understanding through 'dialogue, conversation, undistorted communication, communal judgment, and the type of rational wooing that can take place when individuals confront each other as equals and participants.'"<sup>18</sup> And legal pragmatists reject sharp distinctions between ends and means: "goals themselves are never final; 'they are at best momentary resting points whose attainment has further foreseeable consequences, desirable or undesirable; hence they must themselves be evaluated as means relative to those consequences. Similarly, the means we select to accomplish our ends are not exclusively instrumental; 'activities, however instrumentally conceived, are to be evaluated by their intrinsic satisfactions or frustrations as well as by their consequences.'"<sup>19</sup>

What is happening in that moment when a judge decides what rule from the precedents to apply? The pragmatists suggest only the most general answer. But the one universally rejected answer is that the result "reads off" and binds from the words of the prior case.<sup>20</sup>

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<sup>16</sup> Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2075-79 (1996).

<sup>17</sup> *Id.*, at 2082-85.

<sup>18</sup> *Id.*, at 2087, quoting RICHARD BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983), at 223.

<sup>19</sup> *Id.*, at 2093, quoting Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 852 (1989).

<sup>20</sup> Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L. J. 231, 252-57 (1990).



B. *Rule-skepticism and the philosophy of rhetoric.*

The legal pragmatists are content to conclude that decision-making is perspectival, and that decisions do not flow inexorably, one upon the prior, from case to case. Rather, decisions are evaluated in terms of pragmatic consequences.<sup>21</sup> The logic is constructed as an after the fact reach back from the desired conclusion to the precedent.

Applying the philosophy of rhetoric in Kant's *Critique of Judgments*, Linda Meyer tries to explain philosophically what happens in the moment when the judge makes that reach.<sup>22</sup> The critical similarity between judgment and common law reasoning is the mental leap from rule to application, where (i) the rule is specified in advance and the judgment is to pick out an example (which Kant called "determinant judgment") or (ii) the universal rule must be found from particular circumstances (which Kant called "reflective judgment").<sup>23</sup> In either case, the mental process of judgment is inductive, and tied to experience because it requires the perception of the world by our senses.<sup>24</sup> Meyer summarizes the process of *ex post* judging as follows:

I have, like others, before drawn on common-law reasoning as a kind of paradigm of judgment, and I will repeat myself here. Rhetoric, thought of as a way of seeing the application of universals to particulars, getting a feel for or sense of the "right" application or "good fit" of a principle, and as allowing through analogical reasoning the extension of existing rules into novel situations, looks a lot like the common law. Common law reasoning also relies on analogies to guide the application of rules. Legal doctrine gives us provisional rules, which are nonetheless tied to a specific context in a case. When a new case arises, it may be distinguished or analogized to the prior case, based on the felt importance of factual similarities. Not just any factual similarities or differences will do; a

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<sup>21</sup> For a defense, based on pragmatic consequences, of the Supreme Court's holding in *Bush v. Gore*, see RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* (2003), at 322-56.

<sup>22</sup> Linda Ross Meyers, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727, 733-34 (1999).

<sup>23</sup> *Id.*, at 736-37.

<sup>24</sup> *Id.* at 735.

distinction must be one with a difference. Why one factual variation makes a difference and another recedes into the background is the slippery and impossible thing for any theory of adjudication to capture. Any explanation of why any such fact does or does not make a difference necessarily restates the rule, alters the doctrine, and is itself provisional and tied to the experience of the case.

Judgment is always like this, according to Kant. The key step, the perception of relevance, is not predetermined by the rule. That perception of relevance is driven by a deeper sense of "fit" or "sense of fairness" that is not reducible to rules and remains in the background, expressible only through metaphor or analogy, tangible only in connection with concrete examples. We point to fit or sense, but we cannot give a rule for it.<sup>25</sup>

Finally, Meyer suggests possibilities for the sources of disagreement. As to adjudication generally, the sources can include (a) run-of-the-mill factual questions (was the light red or green when the defendant went through the intersection?), or (b) conflicts between rules or norms and clashes of values (should we imply a duty of the pool manufacturer to warn the knuckle-headed plaintiff not to dive into an empty pool?). More significantly for the transposition of rule application from the process of judging to the process of contract interpretation, she observes, "there are no rules for the application of rules. Hence, even if the law and facts are clear, there is still uncertainty about how the rule fits the facts. . . . Sometimes this uncertainty is minimal, and we call the case an 'easy' one; sometimes the uncertainty is greater, and we call the case a 'hard' one."<sup>26</sup>

*C. Rule-skepticism and the philosophy of language.*

In their 1996 article, Christian Zapf and Eben Moglen captured the essence of the debate about the degree to which modern philosophical thought on the indeterminacy of language

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<sup>25</sup> *Id.*, at 744-45.

<sup>26</sup> *Id.*, at 752.

supported the general attack on traditional formalism. The skeptical argument is that the law, like language, is indeterminate:

Advocates of the linguistic indeterminacy argument maintain that the applications of words cannot be “read off” from those words in a straightforward way. Their claim is not simply that some words are ambiguous or vague and that we cannot be certain of proper application in some instances. More radically, the argument’s proponents assert that the application of all words is indeterminate if one only looks to the words themselves to determine their meaning. They argue that certainty of application depends on the consensus of an interpretative community about how a word should be applied. The lack of textual guidance, so the argument proceeds, opens the door to an unwarranted judicial freedom in the interpretation of legal texts that is incompatible with certainty in the application of words required by the traditional understanding of the Rule of Law.<sup>27</sup>

It is important for our later transposition of this debate from the overall Rule of Law to the *ex post* disagreement over contract interpretation to understand precisely what Zapf and Moglen were arguing was and was not determinate in language and law. In the *Philosophical Investigations*, Wittgenstein begins with a deconstruction of the formal conception of words as bearing inherent meaning or “pictures.” Words, he argues, have no inherent meaning. We apply a word in context because the thing or circumstance to which we are applying it makes sense in a way that we may not be able to define. Wittgenstein asks, “How did we *learn* the meaning of this word (“good for instance)? From what sort of examples? In what language-games? Then it will be easier for you to see that the word must have a family of meanings.”<sup>28</sup> And he answers:

Compare knowing and saying:

how many feet high Mont Blanc is –  
how the word “game” is used –  
how a clarinet sounds.

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<sup>27</sup> Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L. J. 485 (1996). The authors provide a thorough history of the debate over linguistic indeterminacy and its consequences for the law, beginning with the pragmatism of Dewey and Holmes and continuing through the Legal Realism of Felix Cohen and Jerome Frank. *Id.*, at 508-18.

<sup>28</sup> WITTGENSTEIN, *supra* note 1, §77, at 31<sup>c</sup>.

If you are surprised that one can know something and not be able to say it, you are perhaps thinking of a case like the first. Certainly not of one like the third.<sup>29</sup>

Hence, to the Wittgenstein's middle example, we call football, solitaire, Trivial Pursuits, meeting others in a singles' bar, and the circumstance of nuclear mutually assured destruction "games," not because a single definition of the word will capture all of them perfectly, but because they all bear a relationship to the others in some aspect or another. Wittgenstein calls these "family resemblances."<sup>30</sup> Moreover, our use of words is not reflective: it simply comes into our minds that the word applies the next time we use it. Wittgenstein compares the way a word comes to mind as something more than a random association with a meaningless symbol, but less than conscious analysis of the relationship of the symbol to the thing or concept: it is something like being guided or influenced by the symbol, but even that level of reflection overstates the level of consciousness about the use of the word.

But now notice this: *while* I am being guided, everything is quite simple, I notice nothing *special*; but afterwards, when I ask myself what it was that happened, it seems to have been something indescribable. *Afterwards* no description satisfies me. It's as if I couldn't believe I merely looked, made such-and-such a face, and drew a line. – But don't I *remember* anything else? No; and yet I feel as if there must have been something else; in particular when I say "*guidance*", "*influence*", and other such words to myself. "For surely," I tell myself, "I was being *guided*." – Only then does the idea of that ethereal, intangible influence arise.<sup>31</sup>

Wittgenstein moves from the way we apply words to our ability to invoke scientific method in understanding the use of language. The process of inductive reasoning does not apply to the use of words. First, the use of words is not the product of rational reflection. We do not

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<sup>29</sup> *Id.*, §78, at 31°.

<sup>30</sup> *Id.*, §67, at 27° -28°.

<sup>31</sup> *Id.*, §175, at 61°.

consult an index of previous meanings when we speak new words or new sentences. We just speak. Second, the *ex post* derivation of the meaning by induction of the rule is self-fulfilling:

no course of action could be determined by a rule, because any course of action can be made out to accord with the rule. The answer was: if any action can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict.<sup>32</sup>

In Wittgenstein's example, if I begin to speak the numbers 2, 4, 6, 8, at some point, you say "now I know how to go on" and infer that the next number is one in a sequence of even positive integers. But there was no way of knowing at the time what formula I was using. It may be that I happen to have grown up in a society of nine-fingered people, where our arithmetic has developed in base nine rather than base ten. In that case, it turns out that I am thinking the next number in the sequence is 11, not 10.

The radical jurisprudential skeptics used Wittgenstein to support the thesis that all language was indeterminate, and hence the Rule of Law, derived and transposed from case to case, is illusory. They claimed there was no basis for concluding that the words and sentences of the law expressed in the prior text had any bearing on the judge's decision in a new case. Zapf and Moglen disagreed. While they did not purport to refute all skepticism about formalist notions, they sought to show that Wittgenstein's influential analysis of linguistic rule-following in *Philosophical Investigations* did not support the skeptics' claim of the complete indeterminacy of language, and, hence, the Rule of Law.

When words themselves do not determine their applications, all action is with the reader and hence "all readings . . . become songs of oneself." The debate about the collectivity of that song provides small comfort to our common sense faith in the fact that the words in texts, legal or otherwise, have determinate meanings and confine our applications of them.<sup>33</sup>

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<sup>32</sup> *Id.*, §201, at 69<sup>e</sup>.

<sup>33</sup> *Id.*, at 489 (footnote omitted).

Complete skepticism as to the existence of any commonly understood language rules is equally wrong, because we do have understandings. Wittgenstein did not say words had no accepted meaning: he “argued that the meanings of our words rested on belief or habits that are philosophically erroneous to defend by rational argument. In the long metaphorical identification between rationality and sight in our philosophical tradition, language was said to be applied ‘blindly.’”<sup>34</sup> The likelihood that I was thinking in base nine is remote. Your conclusion that the next number in the sequence is 10 rather than 11 is correct, but it is not based on the careful induction of a rule. It is based on common habits or beliefs at the time we engage in conversation that both of us, without dispute, will accept 10 as the correct answer. But the application of those beliefs is blind. We do not even consider in the moment the likelihood of my having grown up in a society of nine-fingered people.<sup>35</sup> This is consistent with the Kantian

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<sup>34</sup> *Id.*, at 514. The idea of blind application of language rules as between language and the Rule of Law will become important when we turn to the application of language rules to contract interpretation disputes. As Zapf and Moglen aptly observe, “Blindness . . . was a more serious problem for lawyers than for linguists. The application of words in the philosophy of language is a problem with a low normative stake, whereas an inability to give any defense of our application of legal rules threatens our basic conception of legality.” *Id.*

<sup>35</sup> There is another approach to the blind and reflective use of language, but it relates to another issue of language games not explored in this article. Linda Meyer has also criticized the deconstruction of legal theory, with an appeal to Heidegger’s understanding of thinking as illuminating the practical reason involved in adjudication. Her analysis of the Heideggerian “present at hand” and “ready to hand,” as well as the understanding of language as a non-self-conscious act, transposes well to the difference in the language of lawyers and business people.

The usual place to begin looking for Heidegger’s account of practical reason is in *Being and Time*, where he points out the distinction between the *Vorhanden* and the *Zuhanden*, the “present-at-hand” and the “ready-to-hand.” The distinction refers to ways in which things we become involved with can show themselves to us. Usually, things show up as “ready-to-hand,” that is, as things we can do something with. My two-year-old automatically gauges the rocks around her by whether they are “too heavy” or “good for throwing,” the sticks by whether they are long enough or strong enough for poking into a crack in the stone wall. Or sometimes, the things around her suggest the purposes she might have: the blanket might make possible a tent or a game of hide and seek. Recently, she asked me about something: “What is that?” When I replied by giving her the name for the thing, she shook her head in consternation: “No, what is it for?”

But the ready-to-hand is never the object of our attention; our attention is directed at what we are doing and we use our tools or “equipment” without really noticing them or thinking about them. In her spontaneous play, my daughter never contemplates things “in themselves,” dissected for their properties or abstracted from her work/play. To do so would require being involved with things in a way which Heidegger calls the “present-at-hand.” We begin to see the world as present-at-hand

analysis: there is no rule that can dictate a judgment – our reason may tell us that the next number in the sequence is 10, but there is always the remote possibility of the nine-fingered society.<sup>36</sup>

#### IV. CONTRACTS AND THE ILLUSION OF INTENTION

##### A. *The Argument from Language*

##### 1. *Rule Induction, Communicative Action and Normal Cases.*

Let us now end the detour, and make the connection from rule application in the process of judging to a theory, based on the philosophy of language and rhetoric, of the interpretation of contracts. As Zapf and Moglen observed, Wittgenstein did not contend that words were devoid of meaning. To the contrary, it is the normal case in which there are shared bedrock beliefs and customs that give a mutually understood meaning to the word. We may very well disagree whether football and the process of sexual seduction are both games (and therefore have any elements in common), but we will no doubt agree that football is a game.

We may confidently conclude that most contract terms are mutually understood and are not the subject of a dispute. But there is no jurisprudence of a fulfilled agreement. Concepts like

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when things do not work, when they become mere "stuff" by failing to serve their purposes. My daughter cries in frustration when a stick breaks -- it has broken up her play and become an obstacle, mere substance, unconnected with her and with other things. Seeing things as "stuff" that is separated from other things or from human purposes generates theoretical knowledge, a springboard for scientific investigation that makes possible attention to objects "in themselves," questions about their "properties" and classifications not based directly on relations of use. Indeed, even the distinction between descriptive and normative, is and ought, is possible only in abstraction from the ready-to-hand.

Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L. J. 647, 652-53 (1998) (footnotes omitted). Legal terms are ready-to-hand for lawyers. What are not are business terms or business concepts. The clash between business people and lawyers in dealing with language as tool occurs when each is present-at-hand to the other. When the business person says, "let's do a price escalator," that is ready-to-hand. But it quickly becomes present-at-hand. The lawyer asks, "Escalated how?" The client answers, "Based on the cost of living." The lawyer responds, "Which index? Consumer or producer? Over what period? Covering which areas?" In this dialogue, the words as tools have become present at hand. I submit there is another similar issue: even if the words were ready-to-hand for all concerned when the contract was made, they become present-at-hand at the time of litigation.

<sup>36</sup> Meyer, *supra* note 22, at 734-40.

offer, acceptance, and consideration only take meaning when the parties dispute whether there was an agreement. The jurisprudence of contract interpretation only comes to life at the time it is discovered there is something to be debated.

A simple hypothetical demonstrates this. You decide to have breakfast at Doug's Finer Diner, just across the street from the law school.<sup>37</sup> You order the Cholesterol Special, which comes with two eggs made to order. The waitress stops chomping her gum long enough for her to hear you say you will take your eggs "over easy." You do not reflect on the meaning of the words "over easy." Being a scholar of the law, once the waitress says "sure, mac," you consider yourself to have entered into a binding executory contract for the delivery of two eggs "over easy" against the post-meal payment of the check.

The work of Jürgen Habermas subsequent to Wittgenstein can help us parse this mundane interaction. Habermas attempted to construct a model between the objectivist perspective of social science, which purports to induce social theory from the external observation of the participants in the social structure, on one hand, and the subjectivist perspective, in which the entire focus on the mind and intention of the subject fails to account for how the subject has managed to come to internalize any social structure.<sup>38</sup> Habermas' middle ground focuses on language as the means (and the sole means) by which we have intersubjective communicative action. While Wittgenstein focused entirely on the *non-cognitive* use of language – the non-reflective obeying of rules in the application of words to circumstance – Habermas observed a simultaneous dualism.

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<sup>37</sup> I dedicate this hypothetical to my classmate and friend, the eminent scholar and gourmet chef, Professor Douglas Baird, who has never overcooked a fried egg.

<sup>38</sup> JÜRGEN HABERMAS, ON THE PRAGMATICS OF SOCIAL INTERACTION (Barbara Fultner, tr., 2001), at x.



By contrast [to Wittgenstein], Habermas maintains that reaching mutual understanding requires a speaker and hearer to operate at two levels: the level of intersubjectivity on which they speak with one another, and the level of objects or states of affairs about which they communicate. His discussion here is arguably the best, most extensive elucidation of his conception of the “double structure of speech.” He makes it clear that the two uses of language are *interdependent*.<sup>39</sup>

Habermas is saying that the use of language may well be cognitive and non-cognitive simultaneously. Your order of two eggs over easy is the way in which you are able to act communicatively with another subject, the waitress. Together you both assume your assertion of the order in language has meaning apart from the cognitive identification of the eggs and the level to which you want them cooked, but you are not conscious of it. There is propositional content to the statement which is cognitive: “the eggs you are to bring me are to have certain characteristics.” There is also an “illocutionary” aspect that determines the sentence’s validity as a proposition, and which, in Habermas’ model, is communicative. “The model of these claims to validity implied in the pragmatic meaning of a speech act is truth value. . . . The meaning of an assertion qua assertion is that the asserted state of affairs is the case.”<sup>40</sup> Your order is a normative assertion, accepted intersubjectively between you and the waitress, and is valid under prevailing norms if in fact at that moment you want to produce that specific interpersonal relationship – the bringing of food. In the normal case so far, what was cognitive was the desire to have delivered of two eggs cooked to something called “over easy,” which in the entire transaction neither you nor the waitress ever considered again. Whether we consider this interaction (now as external observers) from the standpoint of Wittgenstein or Habermas, everything is fine, life goes on, but we have not developed any jurisprudence of the interpretation of “over easy.”

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<sup>39</sup> *Id.*, at xiii.

<sup>40</sup> *Id.*, at 63.

Indeed, were lawyers (or normal human beings acting like lawyers) to negotiate the breakfast order, Habermas' model would characterize it as a breakdown in normal communicative action.

Communicative action takes place against a background consensus that it renews and develops. When communicative interaction is proceeding smoothly, interlocutors make what they are saying intelligible to one another, grant what they are saying to be true (i.e., they assume the referential expressions they are using pick out objects to which they predicate of them actually apply), recognize the rightness of the norm that the speech act claims to fulfill, and don't doubt each other's sincerity. In short, they mutually accept the validity of the claims being raised. In this "normal" case, a speaker uses expressions such that the hearer understands the speaker as the speaker wants to be understood, she formulates propositional contents such that they represent experiences or facts, she expresses her intentions (sincerely), and she performs speech acts such that they conform to recognized norms of accepted self-images. . . .

When the consensus underlying smoothly functioning communicative interaction breaks down and the flow of the language game is interrupted, particular claims to validity may be thematized. To redeem problematic claims to truth or normative rightness, we must resort to a level of argumentation that Habermas calls *discourse*, through which we seek to attain a *rational* consensus on these claims.<sup>41</sup>

In this, Habermas has captured the duality of language in the artificial dialogue that constitutes the lawyers' negotiation of a contract. In some instances, we postulate a future circumstance and contract language one party believes is dispositive. The other side disagrees. Normal communicative interaction breaks down, and there is discourse we hope leads to a rational consensus, because it is precisely the job of the lawyer to break it down, to see those places where the words are not a valid proposition in light of the postulated circumstance.<sup>42</sup> Yet

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<sup>41</sup> HABERMAS, *supra* note 38, at xv.

<sup>42</sup> I believe the equivalent economic assumption is that the ability to have rational discourse is bounded (we cannot predict all future states of the world), or there is a cost-benefit decision made about the value of having such discourse presently, or leaving it to a judge if there is a dispute later. Both assume a default state of interpersonal cognitive rationality, either bounded by the world or not. My point is that the default state, and hence anything not the subject of rational discourse, is not cognitive, and does not become so, until later circumstance (an alleged breach) make it so.

throughout the negotiation and drafting, words slip through (more than not) as to which there is no discourse, and even as to the words negotiated, there later arise circumstances that vary from those originally postulated.<sup>43</sup>

We return to the hypothetical. Seven minutes later, breakfast arrives. Several possibilities exist now. One is the normal case. The eggs are fine, you eat them, pay the bill, leave a reasonable tip, and go on with your morning, without ever having reflected on the meaning of the term “over easy.” Maybe the eggs were not cooked exactly as you would have cooked them, but it was close enough. There was a mutual understanding based on custom and habit of the meaning of “over easy.” The concept may have had indeterminate edges at which one would say the eggs were either undercooked or overcooked, but the circumstances were that what turned up on your plate reflected a general mutual understanding between you and the cook as to the meaning of “over easy.”

We can compare our mutual understanding of the term “over easy” to Wittgenstein’s explanation of the possible mutual understanding of a word like “leaf.” What does “leaf” mean

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<sup>43</sup> Here is example of this particular duality, drawn from the negotiation of a CEO’s employment contract:

[A] board and a selected CEO candidate reached an impasse over whether a single DUI conviction would be cause for termination. The designated CEO had no criminal record. No special conditions pointed to a problem; the disagreement was philosophical and hypothetical. The impasse was resolved with language about criminal convictions constituting cause, “including misdemeanors and infractions that are harmful to the business interests of the company.” Each party preserved its arguments regarding whether a single DUI conviction would constitute cause, the contract was signed, the problem never arose, and the CEO and the company have become among the most successful in the nation.

Garry G. Mathiason, *How to Fire a CEO*, EXECUTIVE COUNSEL, Fall 2004, at 12, 15. The parties knew they left the question of DUI open. In at least one state, however, driving an automobile with expired license plates is a misdemeanor. Assume also that the following are misdemeanors: some forms of domestic violence, indecent exposure, and possession of marijuana. There has been no *ex ante* discourse about these applications of the contractual rule “misdemeanor harmful to business interest.” The practice of the rule will come later and not be a cognitive act. There is no rule for deciding if an isolated case of misdemeanor domestic violence is harmful to the business. Each of the interested parties will decide in a non-cognitive way if the rule applies in that case. The later debate, if there is a dispute over termination for cause, will be over interpretation: what rule emanates from those words?

when we do not have in mind any particular leaf? And what does “over easy” mean when we do not have, before we order, a specific reference to two already-cooked eggs?

Here also belongs the idea that if you see this leaf as a sample of “leaf shape in general” you see it differently from someone who regards it as, say, a sample of this particular shape. Now this might well be so – though it is not so – for it would only be to say that, as a matter of experience, if you see the leaf in a particular way, you use it in such-and-such a way or according to such-and-such rules. Of course, there is such a thing as seeing in this way or that; and there are also cases where whoever sees a sample like this will in general use it in this way, and whoever sees it otherwise in another way.<sup>44</sup>

You and the cook may not have agreed that the eggs, as they turned out, were as you wanted them. You may have had different images, when you thought about it, of the perfect “over easy.” There is no dispute, indeed no conscious reflection; nevertheless, these eggs are “over easy.”

The elusiveness of speech as communicative or cognitive or both is demonstrated by the next possibility. The eggs arrived fried, but the yolks are cooked to the point that they are half solid yellow and half congealed orange. You now reflect on the meaning of “over easy.” In your mind, over easy eggs have the whites thoroughly cooked, indeed, to the point of being crisp on the edges, with no runniness whatsoever, but the interior of the yolks are still completely liquid. These eggs are not “over easy.” In your mind, the cook has breached the agreement. Your nature, however, is not to complain. You eat the eggs, pay the bill, but leave a smaller tip. You have reflected now on the meaning of the term, but there is no jurisprudence.

The next possibility is the same as the previous, except that you are particular about your eggs and call the waitress over. You point out the state of the eggs, the waitress agrees they are not “over easy,” and she returns four minutes later with new perfectly cooked eggs and a

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<sup>44</sup> WITTGENSTEIN, *supra* note 1, §§73-74, at 30<sup>e</sup>.

complementary glass of orange juice. There has been no dispute as to the meaning of the term, you have been satisfied, and there is still no jurisprudence.

## 2. *Rule Induction and Disputed Cases*

As Richard Posner observes, normal cases are generally uninteresting.<sup>45</sup> Tension arises when the application of agreed legal language in later disputed circumstances is not normal. The last possibility is that you call the waitress back, point out the congealed state of the yolk and offer the view that under any state of affairs, that is not an “over easy” egg. She calls the cook, who stalks out of the kitchen to inform you, “That’s the way we cook ‘em, bub.” You consider litigation, and calling a gaggle of culinary experts to testify to the common understanding in the trade of an “over easy” egg, but instead decide to console yourself in the words of Wittgenstein:

It is only in normal cases that the use of a word is clearly prescribed; we know, are in no doubt, what to say in this or that case. The more abnormal the case, the more doubtful it becomes what we are to say. . . . The procedure of putting a lump of cheese on a balance and fixing the price by the turn of the scale would lose its point if it frequently happened that such lumps suddenly grew or shrank for no obvious reason.<sup>46</sup>

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<sup>45</sup> “The defendant may challenge the plaintiff’s interpretation of the contract rather than acknowledge the breach, but unless there is a real uncertainty about the meaning of the contract no interesting question of interpretation is presented.” Posner, *supra* note 2, at 2. The key phrase in the foregoing sentence is “real uncertainty.” In fairness, Judge Posner acknowledges the role of other disciplines in contract interpretation, and seeks to propose an economic explanation of the problem. Nevertheless, relegating “real uncertainty” in language to “clumsiness in the use of words,” *id.*, fails to give due credit to the uncertainty that is inherent in the very use of words.

<sup>46</sup> WITTGENSTEIN, *supra* note 1, §142, at 42°. To Wittgenstein, words take on meaning in the context of “language-games,” mutually understood usages of words. *Id.*, §7, at 4°. Two easy illustrations of common language game usages in business come to mind. Business people regularly use the words “partner” or “partnership” to describe a close business relationship regardless of the nature of the underlying contract. Purchasing people regularly refer to their “supplier-partners,” for example. In that language game, “partner” has no legal significance. Lawyers, using the word in the legal language game, choke every time they see this, understanding that calling someone a partner

Here is the central thesis. We can apply Wittgenstein: our disagreement about the meaning of “over easy,” like most colorable disputes arising in complex business transactions, arises only in the context of the present dispute, well after the parties executed the contract. Conflicting interpretations of the agreement by the parties are attempts to derive, on an *ex post* basis inductive rules from the words of the contract that should have, had we been thinking about it at the time we contracted, dictated the result in a particular circumstance. Because this is precisely what we *cannot* do, by the very nature of words and language, then a meeting of the minds is a self-fulfilling conclusion. If the mutual intention is clear enough, there is no dispute

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may mean that someone else may rely on that characterization, and later invoke the law that says partners are mutual agents of one another.

Another illustration is the interesting dialogue that goes on between auditors and lawyers over the word “probable” as it applies to a contingent liability. Under the Statement of Financial Accounting Standards No. 5 (“FAS 5”), part of the definition of generally accepted accounting principles (“GAAP”), auditors use the word “probable” to indicate one of three different states of likelihood – the other two are “reasonably possible” and “remote” – that future events will confirm the incurrence of a liability. AICPA PROFESSIONAL STANDARDS (1987), AU §337C, at 407. If an event is probable and the amount of the loss is reasonably estimable, FAS 5 requires that the obligation be booked as an accrual (an expense, and hence a charge to earnings) on the income statement and a liability on the balance sheet. “Probable” is defined as “[t]he future event or events are likely to occur.” Telling an auditor one has a better than even chance of losing a case in which the amount of the loss can be estimated is tantamount to incurring the expense. Lawyers, on the other hand, use loose language of probability to convey a sense of the outcome to their clients on a regular basis. “Your odds of winning are 50-50 60-40, one in ten, etc.” The ABA has attempted to cover these conflicting uses of language in its Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information:

Concepts of probability inherent in the usage of terms like “probable” or “reasonably possible” or “remote” mean different things in different contexts. Generally, the outcome of, or the loss which may result from, litigation cannot be assessed in any way that is comparable to a statistically or empirically determined concept of “probability”. . . . Lawyers do not generally quantify for clients the “odds” in numerical terms; if they do, the quantification is generally only undertaken in an effort to make meaningful, for limited purposes, a whole host of judgmental factors applicable at a particular time, with any intention to depict “probability” in any statistical, scientific or empirically-grounded sense.

*Id.*, at 409-10.

to come before a judge (or the case is ridiculously easy and arises out of some motivation other than a real dispute over interpretation).<sup>47</sup>

### B. *Confusion, Pragmatism and Opportunism*

Philosophy and pragmatism converge when there is an *ex post* dispute about the point of agreement. Dennis Patterson has argued persuasively there is no inconsistency between our inability to induce the application of a rule from the rule itself, and our understanding the point of the rule to be applied in the next case.<sup>48</sup> The philosophy of language says there is nothing inherent in the rule that dictates its application to the next set of facts – we simply apply the rule, we do not interpret it. But, as Patterson observes, there is nothing stopping a judge from considering why she is applying the rule – what reasons for the rule would dictate a conclusion one way or another. Hence, there is a point to the law that can develop from case to case.

Patterson begins by examining the two problems of rule-following. The first is “over-determination.” One can never know if the present use of a word accords with past use, or if a present action accords with a pre-existing rule, for the use of the word or the action can always be shown to be in accord with many different rules.<sup>49</sup>

[t]here can be no such thing as meaning anything by any word. Each new application we make is a leap in the dark; any present intention could be interpreted so as to accord with anything we may choose to do. So there can be neither accord, nor conflict. This is what Wittgenstein said in §202.<sup>50</sup>

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<sup>47</sup> In my experience, this occurs relatively more often in patent cases, but the paradigm may apply equally to contract cases.

<sup>48</sup> Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990).

<sup>49</sup> *Id.*, at 943.

<sup>50</sup> *Id.*, quoting SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 55 (1982)

The other problem is “under-determination:” is any system of rules capable of determining, and allow the rule-followers to know, when they are conforming to a particular rule?<sup>51</sup>

Patterson summarizes the two schools by which the over-determination and under-determination problems are addressed. One is the “community consensus” school. It says following a rule correctly means practicing it in accordance with the common ways that have been established for settling what it means to “go on” with the rule. The normal practice of a rule is part of social practice, institution or custom.<sup>52</sup> The contrary view says there must be an internal relation between a rule and acts that accord with it, and this relation is independent of any community consensus about the rule.

“[t]he rule and nothing but the rule determines what is correct.” Rule-following is not social; it is grammatical. The internal relation between a rule and what accords with it is isomorphic and closed. Precedent teaches us nothing about what a rule does or does not require. Only the rule can do that. Precedent is nothing more than the history of correct and incorrect applications of what the rule requires; its merely illustrative and not determinative of correct application.<sup>53</sup>

While accepting the “internal relation” position, Patterson argues that “what a rule requires in a given case is essentially a social decision. . . . [T]he determination of what a legal rule requires is arrived at through the disclosure of the point of the rule in a legal system, a ‘disclosure’ that is essentially a matter of social anthropology.”<sup>54</sup>

Community consensus does not, by itself, determine what constitutes acting in accordance with a rule. Rather, what constitutes acting in accordance with a rule is determined by the point of the rule and is analytically and socially specifiable apart from the rule. Thus, it is indeed true that there is necessarily a social

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<sup>51</sup> *Id.*, at 944.

<sup>52</sup> *Id.*, at 947.

<sup>53</sup> *Id.*, at 951-52.

<sup>54</sup> *Id.*, at 953.



element to rule-following, but it is not true that community consensus alone decides what constitutes acting in accordance with a rule.<sup>55</sup>

The distinction between the advance of the rule of law and the interpretation of a contract is, in the latter case, there is no social element to which one can necessarily appeal for the “point” of the rule. The rule of the contract is private ordering whose articulation exists nowhere except in the interaction of the parties, either in the language of the agreement or in conduct that would purport to interpret it. To do otherwise is to insert what we assume the parties must have meant, but in a truly disputed case, it means adopting one view to the contrary insistence of the other, or imposing a standard we cannot ensure either party considered. There is no “point” to cooking an egg to the standard of “over easy;” you either do or you do not.<sup>56</sup> We may well impose a community standard of “over easy” to decide the litigation, but by that determination we have still not concluded whether the egg was cooked as the parties mutually intended it to be. To understand the point of the private rule is to understand the application of the rule, and the application is simply defined by the rule.

Law and economics scholars appear to concede there is a “point” to the contract provision in question, and the parties could state it clearly, but they make *ex ante* rational calculations about the value of resolving gaps and ambiguities. It is not uncommon to find rational actor theorists positing that the decision not to be clearer is a matter of weighing relative *ex ante* and *ex post* cost and benefit.<sup>57</sup> I suggest, rather, the problem of gaps and ambiguities is a product of language and pragmatics not reducible to scientific formula.

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<sup>55</sup> *Id.*

<sup>56</sup> I realize this may be slightly overstating the case. It is possible that one could argue the “point” of the ambiguous term by harmonizing it with other provisions of the contract. But I am assuming each side is equally capable of harmonization – and that is the basis for having a dispute.

<sup>57</sup> Posner, *supra* note 2, at 3.

In the fried egg case, it is not simply not pragmatic to have thought that in addition to specifying “over easy,” I should have spent time and resources spelling out to the waitress precisely what I meant by the term. What is more likely (and comports with my experience in doing far more complex deals) is that if I have had this problem before, I may, regardless of its obviousness to everyone else, make abundantly clear what I mean by the term. Like generals planning to fight the last war, every time I walk into a diner I now specify the exact specifications of an “over easy” egg. But I do not specify the crispness of the bacon, or the brownness of the toast, and it may well be that those are the areas that will be disputed in the next case. I contend this is typical of any transaction, regardless of its apparent simplicity.

Perhaps the problem is the impracticability of spending enough time and money anticipating the state of a cooked egg (or its commercial equivalent). In the arena of complex deals, the purchase and sale of businesses, with values of several millions to multi-billions of dollars, the practical reality is that gaps and ambiguities also never disappear. Despite the presumption given to such agreements, that they have been tightly negotiated by highly sophisticated and rational lawyers, the philosophy of language teaches us that we begin with a default state of language as communicative and not cognitive, and hence as often unreflective as not. I suggest that when gaps and ambiguities are deliberate, it is not so much the result of a cost-benefit analysis as the result of working lawyers’ intuitive understanding of the philosophical insight: it is only a matter of chance which provisions of the contract, if any, turn out to be disputed.

Consider the number of ways in which contracts, even in sophisticated circumstances, may not constitute, in Habermas’ phrase, the result of rational discourse.

*Deliberate ambiguity.* This is a conscious bet that the subject will not become an issue, or if it is, it can be negotiated, and if not, it is simply a chance the parties (or their lawyers, given that they may never communicate it to their clients, depending on the materiality level within the agreement at the time). Lawyers either say, or think: "Let's write it this way, and if we ever have a dispute, I'll say it means this and you'll say it means that." The lawyers or their clients have other supervening goals, and are willing to live with that open issue.<sup>58</sup>

*Complexity.* The world is simply too complex. An example is the negotiation of a complex commercial lease in which the tenant has agreed to take space in a building yet to be vacated, or to accept space in another building yet to be constructed if the current tenant in the first building did not vacate by a certain date. In theory (per von Neumann's dictum that chess is a trivial game) all of the moves could be determined in a 1,000 page contract, but at some point the lawyers just punt and write either some indeterminate gibberish or a resort to a purported objective standard.<sup>59</sup>

*Deliberate default to a putatively objective standard.* The following is a common compromise where one party wants complete and unfettered autonomy in the assignment of an agreement, and the other wants a veto right: "You must obtain consent to assignment of the contract, which consent will not be unreasonably withheld." No working lawyer has any idea what it means. But the phrase is one of the most common ways to solve that particular impasse.

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<sup>58</sup> Even this rational calculation has shades of subtlety. I once renegotiated an agreement in which the assignability of the contract was important, but the original contract was ambiguous on that point. With the full concurrence of the business people involved, we agreed to disagree, and wrote a provision that said nothing in the new contract could be construed one way or the other as a concession on the meaning of the original ambiguity. More often than not, working in the arcane depths of representations and warranties, covenants and conditions of a hundred page acquisition agreement, the lawyers on both sides know that their respective clients would never tolerate the deal falling apart over some technical language on the environmental representations, for example, and the lawyers find a way to compromise among themselves without the parties themselves ever having had an intention one way or another. Sometimes those issues are significant enough to be elevated to the business decision-makers, but more often, they are not.

*Sloppiness.* One of the first major acquisition agreements I did as a young lawyer had a complex earn out provision. I was aghast some time later to read it (fortunately it never became an issue, the business no longer exists, and, in any event, the statute of limitations has long since passed) and found that in the heat of battle, drafting in the wee hours, I had managed to insert two wholly inconsistent formula terms about four pages apart.<sup>60</sup>

*Real misunderstanding.* Here we return to Patterson's analysis. He distinguishes "easy cases" in which the rule clearly dictates its application. Again, the lesson of the egg story is we recognize those easy applications all the time. *We almost never litigate them, at least to the point we ask a judge or jury to decide the application.*

In hard cases, the very impossibility of looking to the application of the rule itself leads Patterson to pragmatism. What is the problem we are trying to solve? Over-determination and under-determination in rule-following cannot be solved. We can rationalize a decision in a particular fact situation back to any of a number of rules, and we cannot predict how a rule necessarily is to be applied in the next case. The only recourse is to pragmatism in the tradition of Holmes: apply a rule to decide the case that appears to have a coherent narrative from the past, and which works to solve the problem in the present.<sup>61</sup>

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<sup>59</sup> This is a case drawn from my experience. Details supplied confidentially on request.

<sup>60</sup> Conditional Asset Purchase Agreement between DPM Acquisition Corporation, as Purchaser, and Michael Ladney, Detroit Plastic Molding Company, Nashville Plastic Products, Inc., and North American Plastics Co., Limited, November 13, 1989, on file with the author.

<sup>61</sup> Id., at 987-96. See also JAMES J. WHITE AND ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972), at 14 ("When all else fails the lawyer may turn to rules of interpretation and construction. The Code's Chief Reporter, Karl N. Llewellyn, once sought to demonstrate that for every rule of construction some court had invoked, another court had invoked a different rule with opposite effect.")

Patterson sees disputes resolved, and rules of law applied, by the attempts of lawyers to weave coherent narrative from the past to the present, with none having a presumption of validity.

If no form of representation (narrative) is privileged, then isn't one story as good as another? There can be no doubt that many legal narratives are "politically" motivated in the sense that they represent a particular vision of social life. But that is what I have been arguing all along: law is an institutional forum for the advancement of arguments (narratives) about how we are to live. The judgments of the participants in the discourse are the product of arguments which occur "within an institutionally defined structure of opportunities and possibilities." The task of the committed discursive participant is to make of the institutionally defined possibilities for argument what she will. The denser the institutional history, the greater the possibilities for argument.<sup>62</sup>

What Patterson calls narrative and argument in the development of the law "within an institutionally defined structure of opportunities and possibilities," contract theorists would call "opportunism," merely because the parties to the dispute were also parties to the writing. When considering the application of an ambiguous rule to the present circumstance under the contract, there is no reason to expect a party to do anything other than argue that the rule of the contract requires the result sought (Patterson's easy case), or that the point of the rule must be such-and-such, and therefore the ambiguity must be so construed (Patterson's hard case).<sup>63</sup>

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<sup>62</sup> *Id.*, at 995 (footnotes omitted).

<sup>63</sup> The process of arguing the correct interpretation of the contract, if any, could also be analogized to the techniques of rhetoric, as Meyer has argued. See discussion *supra* notes 22-26, and accompanying text. The point, it seems to me, whether you use the imagery of Meyer or Patterson, is the same: the argument is a reflective debate over the correct application of the rule, and different from the mere application of the rule, as it occurred in the circumstance. See also George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995) (arguing that legal textualism must include, based on insights of twentieth-century hermeneutics and philosophy of language, analysis of internal and external context of the words of the law, and that interpretation of a statutory text remains, ultimately, a task of judgment.)

The most thorough discussion of a structure within which to conduct this debate over the point of an agreement is David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991). Professor Charny criticized the attempt of courts to derive the hypothetical bargain that parties who had left gaps or ambiguities would have struck had they explicitly considered the subject. The crux of the criticism is that this focus may well leave in place rules of construction that are overall inefficient from the standpoint of the overall maximization of economic welfare. Professor Charny proposed generally interpreting contracts in a way that would

Indeed, for a rational actor in the face of such an ambiguity, the formula would be something like the value of the opportunity for advantage under the agreement multiplied by the likelihood of success less the net transaction costs and benefits.<sup>64</sup>

*C. What Contract Theory Missed*

*1. The Philosophy of Promising.*

I am not as cynical about the moral basis of promising as the foregoing discussion might have one believe. I agree with Charles Fried that there is an underpinning of moral philosophy in the act of making a promise.<sup>65</sup> I concur with his Kantian premise that it is the act of a free and autonomous agent by which one supplies a reason, not merely a cause, for acting in the physical world.<sup>66</sup>

But my idealism does not extend so far as to believe that there will be perfect, or even workable, shared understanding around either the fact of an agreement, its terms, or the meaning of the words of the pact. Most of the time, we will honor the words of our agreement as against subsequent events as we did in the “over easy” egg case. Other times the case will be easy (and for that reason, as often as not, never brought unless the benefit – economic or psychological – of

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minimize transaction costs for future transactors in contracting around the rule adopted by the court. It seems to me I arrive at about the same place as Professor Charny but from a different route. Professor Charny would abandon the search for hypothetical mutual intent and jump straight to a sort of judicial pragmatism, perhaps simply assuming that the desire for pragmatic result was so obvious little else needed to be said. Thirteen years after he published his article, however, contract scholars, even those with an economic bent, do not appear to have heeded his advice. My approach is to get at *why* it is we are justified in not looking for the hypothetical intent in a fairly disputed case: it did not exist.

<sup>64</sup> The transaction costs would be the direct and indirect costs of going forward with the litigation. A transactional benefit is one that obtains from the mere fact of litigating the contract. This is something one sees relatively frequently in patent litigation. The cost of suing a competitor over a patent is really part of the patent holder’s marketing costs, and is not viewed as a litigation cost. The patent holder’s sales people, under guise of a qualified privilege, are able to toss a copy of the complaint on the buyer’s desk and say “do you really want to buy from them, in view of the injunction we will be seeking?”

<sup>65</sup> CHARLES FRIED, *CONTRACT AS PROMISE* (1981), 1.

<sup>66</sup> *Id.*

the *pendency* of the litigation, regardless of outcome, itself is expected to justify the transaction costs because the shared meaning is so obvious, based on community standards what the point of the rule is. But where there is a real *ex post* dispute over interpretation, we only know the parties made promises – it will not tell us what they meant.

Even Fried, however, abandons recourse to morality in trying to fill gaps in the parties' agreement. It is difficult to rely on contract as promise when everyone agrees only that their promise, whatever it was, did not deal with the present circumstance. Fried cites Wittgenstein, and uses his rule-induction example, in an explanation of classical contract theory's attempt to force-fit issues of mistake and frustration into a presumed mutual will of the parties.

[I]n contract law there is a vaguely marked boundary between interpreting what was agreed to and interpolating terms to which the parties in all probability would have agreed but did not. The further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the promise principle and the more palpably they are imposing an agreement. That this is a term the parties might have agreed to is just one kind of reason courts may have for imposing a term on them to which they have not agreed. That decision is the courts' and not the parties', as is shown by the fact that there are some terms courts would not impose even if they believed the parties might have agreed to them had they thought about them. Courts would, for instance, insist that the terms they impose be fair, that they take the interests of both parties into account – even if perhaps the parties themselves might have been less fastidious. So as we move farther from actual intention the standard of presumed intention tends to merge into the other substantive standards used to solve the problems caused by a failure in the agreement.<sup>67</sup>

Fried's analysis is based on the cases most akin to interpolation and not interpretation, those of mistake, frustration and impossibility.<sup>68</sup> While he comes tantalizingly close, he does not

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<sup>67</sup> *Id.*, at 60-61.

<sup>68</sup> Fried uses three classic cases to illustrate his point. *Griffith v. Brymer*, 19 T.L.R. 434 (K.B. 1903), and *Krell v. Henry*, 2 K.B. 740 (C.A. 1903), arose out of the postponement of the coronation of King Edward I from June 26 to August 9, 1902 due to the king's illness. Each involved contracts to rent rooms overlooking the parade route. In *Griffith*, the contract was made after the decision to cancel the procession, and the lessee was granted relief on account of mistake. In *Krell*, the contract was made before the cancellation and relief was granted on the basis of frustration. In *Taylor v. Caldwell*, 3 Best and S. 826 (Q.B. 1863), a music hall burned down, and the owner sought relief from his obligation to have a music hall for the performers who had rented it for a day after the fire. The court

see that interpretation of agreed terms and interpolation of absent terms, far from being separated even by a vaguely marked boundary, are simply two instances of the same problem.

. . . Is not the contractual enterprise just that enterprise in which mutual obligations have been willingly undertaken; and yet do not contractual accidents occur precisely because no mutual engagements have been made; so that we are constructing a kind of nonconsensual penumbra around the consensual core? In terms of what do we construct this penumbra? Not in terms of the wills or promises of the parties. Obviously some standard of sharing external to the intention of the parties must control.

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A contractual relation is a good example of a concrete relation that may give rise to a more focused duty to share another's good or ill fortune. The relation is, after all, freely chosen. Indeed this is the same idea as that the contractual parties are in a common enterprise – an enterprise they explicitly chose to enter. True, the bond does extend beyond the explicit terms of the contract, since the problems we are concerned with are by hypothesis not explicitly disposed of in the contract.<sup>69</sup>

This feels like a distinction without a difference. Where is the distinction between *interpolation* – we cannot find words, which had we used them, would have solved the current problem – and *interpretation* – we cannot agree the words we used may be applied to solve the current problem? The only difference is that in the case of interpolation, we failed to use any words that we can now agree address the present situation, and in the case of interpretation, we disagree how, if at all, the words we did use apply. In either case, the parties establish a set of rules and then apply them to the circumstances. That application, like all rule-following, is a practice and neither *interpolation* nor *interpretation*.<sup>70</sup> In contrast, the *ex post* attempt to resolve

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also granted relief on the basis of frustration or impossibility. FRIED, *supra* note 65, at 58-59. In each of these cases, the issue was not a matter of parsing through ambiguous or contested terms, but that the parties had not even considered the circumstance that arose later.

<sup>69</sup> *Id.*, at 72-73.

<sup>70</sup> WITTGENSTEIN, *supra* note 1, §219, at 72<sup>e</sup>:



the dispute by resort back to the contract is, by definition, either an exercise in interpolation or interpretation, but what it is clearly not is the *practice* of the rule. Put another way, the judge is trying to put logic to the practice, but the practice is not logical or interpretational; it is reflexive.<sup>71</sup>

The fundamental flaw is the attempt to construct a moral theory of promise in normal cases from abnormal pathologies. As Fried observes, “‘Reasonable’ parties do not merely seek to accomplish rational objectives; they do so constrained by norms of fairness and honesty.”<sup>72</sup> We apply our own words, written in the past, in the present context. If we have no dispute, or are constrained by norms of fairness and honesty to consider the other party’s interpretation as within the realm of reason, there is no dispute, no case, and no law. If there is no basis in the community’s notion of bedrock beliefs that would permit such-and-such application of the words, it will be an easy case. But if there is truly a basis for disagreement, the spinning of a

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“All the steps are already taken” means: I no longer have any choice. The rule, once stamped with a particular meaning, traces the lines along which it is to be followed through the whole of space. – But if something of this sort were really the case, how would it help?

No; my description only made sense if it was to be understood symbolically. – I should have said: *This is how it strikes me.*

When I obey a rule, I do not choose.

I obey the rule *blindly*.

<sup>71</sup> Id., §201, at 69<sup>e</sup>:

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases.

See also DENNIS PATTERSON, LAW & TRUTH (1996), at 87 (“Interpretation is an activity of clarification: we take the utterance in question and appraise competing construals or interpretations of it in an effort to clarify its meaning.”)

<sup>72</sup> Id.

plausible narrative, as Patterson would describe it, then there never was a mutual intended meaning that can be derived from the words.<sup>73</sup>

## 2. *Contract Language and Economics.*

I want to focus on just a few examples in the literature of economic contract theory where the non-rational practice of rule-induction appears to be confused with the distinct process of *ex post* rule interpretation.

The recent article by Alan Schwartz and Robert Scott (S&S) on the limits of contract theory, while a thorough and articulate exposition of the role of language and meaning in the interpretation of business contracts, does not address the way words are applied *ex post*, and hence succumbs to precisely the problems anticipated by Wittgenstein.<sup>74</sup> S&S's analysis starts with the claim that "contract law should facilitate the efforts of the contracting parties to maximize the joint gains (the 'contractual surplus') from transactions . . . [and] should do nothing else."<sup>75</sup> Because the model depends on the assumption that the parties are rational actors seeking to maximize welfare, S&S would limit application of the model not only to business firms contracting with each other, but firms they conclude would have the requisite sophistication.<sup>76</sup> I do not intend to address whether S&S are persuasive in the argument that a sole criterion – welfare maximization – should inform policy around the resolution of business

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<sup>73</sup> I agree with the general import of Fried's position: if you are so unreasonable as not to agree about what the contract means, or have made the foolish mistake of contracting with an unreasonable party, and must have your disputes resolved by a third party, you have no complaint when the third party fails to honor the illusory mutual intention.

<sup>74</sup> Schwartz & Scott, *supra* note 13.

<sup>75</sup> *Id.*, at 544.

<sup>76</sup> *Id.*, at 545. S&S would define a sophisticated firm as one organized in the corporate form and having five or more employees, a limited partnership, or a professional partnership.

contract disputes.<sup>77</sup> Instead, I want to examine one of the implications of their theory – the “theory of interpretation that ‘maps’ from the semantic content of the parties’ writing to the writing’s legal implications.”<sup>78</sup>

S&S argue for formalistic interpretation of business-business contracts (in contrast to the contextualist philosophy of the UCC), on theory that firms would “commonly prefer courts to adhere as closely as possible to the ordinary meanings of words, to apply a ‘hard’ parole evidence rule, and to honor ‘merger clauses’ (which state that the parties intended their writing to be interpreted as if it were complete).”<sup>79</sup> As to businesses, S&S conclude: “Of first-order importance, firms want the state to enforce the contracts that they write, not the contracts that a decisionmaker with a concern for fairness would prefer them to have written.” This circles back to the view that there is a “correct answer” of interpretation capable of being discerned:

There is consensus among courts and commentators that the appropriate goal of contract interpretation is to have the enforcing court find the “correct answer.” The “correct answer” is the solution to a contracting problem that the parties intended to enact. Intention, however, is determined objectively and prospectively: A party is taken to mean what its contract partner could plausibly believe it meant when the parties.<sup>80</sup>

I register a dissenting view to this apparent consensus. S&S coin the usages “majority talk” and “party talk” as though there were truly an empirical distinction between the way people use words when they are speaking ordinarily and when they write agreements. Boiled down to its essence, S&S’s proposal is that courts presume ordinary meaning – majority talk – unless the

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<sup>77</sup> *Id.*, at 550-56.

<sup>78</sup> *Id.*, at 547.

<sup>79</sup> *Id.* S&S do not express a view on the acceptability of a contextualist approach for contracts other than business-business. *Id.* at 545.

<sup>80</sup> *Id.*, at 568-69.

parties have done something in the contract to indicate there is a non-majority language being used.<sup>81</sup>

I suggest instead that firms read off contracts as would best benefit the party at the time that the contractual language arguably has effect, applying the rule of the words, as Wittgenstein tells us, reflexively and blindly and without regard to what the other party may or may not have understood at the time of the contract. Are the words capable of interpretation? Of course, but that is not the same as their use: “[t]here is an inclination to say: any action according to the rule is an interpretation. But we ought to restrict the term ‘interpretation’ to the substitution of one expression of the rule for another.”<sup>82</sup>

S&S do not err in observing that contracts are “intertemporal” (i.e., agree today, do tomorrow), and that self-enforcing agreements or those that can be enforced with reputational sanctions will not require the intervention of the state to enforce a promise.<sup>83</sup> The error is in presupposing that the textual approach is meaningful as a reflection of the parties’ intention. If the words have an obvious ordinary meaning, they would either not be in dispute, or the case would be easy. In an exercise of *interpretation*, not practice, lawyers will spin narratives not to interpose between the statement of a rule and its application (which is inductively impossible), but to argue that the point of the contractual words were such-and-such, and hence, that is the interpretation the court should enforce. The court may decide that the words have alternative and non-obvious ordinary meanings, but the selection of one will be a matter of applying an exogenous standard, and not the determination of a mutually intended meaning.

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<sup>81</sup> *Id.*, at 584 (“We next set out four reasons why the ‘linguistic default’ should hold that the contract was written in majority talk. The practical implication of this proposal is that, when a contract does not speak to the issue, the court should not go beyond the evidentiary base  $B_{\min}$  when attempting to identify the language of the contract.”)

<sup>82</sup> WITTGENSTEIN, *supra* note 1, §201, at 69°.

<sup>83</sup> *Id.*, at 557.

The philosophical problem is the presumption (no doubt fueled by the requirements of rational actor theory) that the parties considered *ex ante* the circumstances to which the words of their agreement would be applied. Indeed, the discussion of under-determination and over-determination above demonstrates that language works in precisely the *opposite* way. Nothing in the *ex ante* statement of the rule, in any talk, majority or party, tells the parties how they will apply the words (as contrasted with the fortuity of using an example in the contract that anticipates an application to the circumstances that arise later). And once the facts arise, any number of rules (i.e., how we meant to apply the words) are possible (although some may be more plausible than others).

The confusion of practice and interpretation leads S&S directly to the problem of opportunism. If they assume the use of language in the first instance was a rational exercise (essentially an imaginary mutual step forward in time in order to conduct an *ex ante* dry run of the *ex post* interpretation), then it follows that violation of the *ex ante/ex post* interpretation is opportunistic: “we seem to have understood each other as to how we would have interpreted this party talk language, and you are going back on it.” S&S’s proposed solution is to mandate a default rule of “majority talk:” “requiring parties *ex ante* to say they are writing in a private language would largely ameliorate the concern that a party would attempt to rescue itself from a bad deal by claiming that its contract was written in a mythical private language.”<sup>84</sup>

I suggest S&S have knocked down a straw man. It will be an easy case if the opportunistic party A’s *ex post* position is far removed from ordinary and accepted meanings, and A shows no evidence she and B meant “black” or even “gray” when they said “white.” The harder case is where the words, even in majority talk, are ambiguous. There A and B will both

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<sup>84</sup> *Id.*, at 585-86.

have plausible positions as to the correct rule to be induced from the words of the agreement. Indeed, that is how they came to be arguing about it. Now A's position becomes opportunistic only after a third party decides that her application of the words was not what the parties intended *ex ante*, even though they only applied the words, and argued over the application, *ex post*.

Indeed, the characterization of "party talk" as a private language is jarring in view of what is generally referred to as Wittgenstein's "private language argument." If it exists at all, party talk is a public language, albeit one that is restricted to a particular segment of the public. Contrast this with the hypothetical private language Wittgenstein describes. Each of us thinks about objects or things in language that comes to us from an outside world. We express those thoughts in language. If we happen to have private objects in our minds, then by definition we cannot refer to them in the public language that comes from the outside. Because a private language cannot, by definition, be expressed, it follows that we cannot describe private objects in a private language, and hence, we cannot even refer to private objects, i.e., those which cannot be described in public language.<sup>85</sup>

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<sup>85</sup> Wittgenstein uses the case of our attempt to describe a sensation that is only ours to make the point:

If I say of myself that it is only from my own case that I know what the word "pain" means – must I not say the same of other people too? And how can I generalize *one* case so irresponsibly?

Now someone tells me that *he* knows what pain is in his own case!

----- Suppose everyone had a box with something in it: we call it a "beetle". No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* own beetle. – Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word "beetle" had a use in these people's language? – If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty. – No, one can 'divide through' by the thing in the box; it cancels out, whatever it is.

WITTGENSTEIN, *supra* note 1, at 85<sup>e</sup>.

Put another way, in our fried eggs language-game, “over easy” means something.<sup>86</sup> The words “over easy” are in a language you did not devise on your own. If it turns out that you are using those words privately in a way the rest of us are not (i.e., within your own mind, “over easy” means “hard-boiled”), yet publicly you use the term as the rest of us, then what you are applying it to privately cannot be “over easy.” A dispute whether the eggs are “over easy” will never be resolved by the imputation of private meaning, because only public meanings exist when we use language that is comprehensible by another. The application of words to describe things, whether in majority talk or party talk, is public, and is the blind, not rational, obedience to a rule. We may still, even in majority talk, nevertheless debate whether the correct rule was used, and that is the far harder case to understand. In the S&S example, we have a community standard to resolve the interpretation issue by default, but we have not gotten to the heart of the way people may blindly follow the rule inherent in the earlier agreed words when faced with the present circumstance.

Here is a demonstration of the pragmatic problem. Practicing lawyers still have the intuitive sense that contract interpretation litigation has a relationship to the *ex ante* preparation only to the extent that the parties were lucky enough to address the particular issue unambiguously in majority talk. Assume there is no party talk and a contract is perfectly clear on a particular point in majority talk. Now looking at the contract, I have an opportunity to breach and save \$150 (apart from the imposition of damages if I lose the case). It will cost me \$150 to defend the breach of contract case, but it will cost the other party \$150 to prosecute it. It seems to me there is a surplus of \$150. I would pay up to \$150 to get out of the contract and be net better off, and given the transaction costs, the innocent party would be willing to let me out

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<sup>86</sup> For an explanation of “language game,” see *supra* note 46.

for some amount less than \$150. The only issue is how that \$150 is split. If the language is clear in majority talk, I can expect I will not be able to take much of the surplus.

Now assume the same opportunistic circumstance, but the CEO comes to the in-house lawyer and says, "Counselor, we're paying \$300 a ton for steel parts under this requirements contract, and because the market has softened, we can now get parts of equal quality for \$150. Find me a way out of this unfavorable contract." The lawyer says, okay, and goes off to read the contract. There she finds the requirements language and somehow the dopes who wrote it used the supplier's BRAND NAME, of all things, to define the requirements. So the agreement says "we are obliged to buy all our requirements of Hectalon EC50 Alloy from Supplier." Hectalon EC50 Alloy is just a brand name for a generic alloy of steel, magnesium, carbon and plutonium in a certain ratio – the generic reference would be to wondermetal. So the in-house lawyer calls supplier's counsel and says, "We no longer have requirements for Hectalon EC50 Alloy. We just want wondermetal, and we are going to buy it elsewhere."

If the parties cannot agree to split the \$150 surplus, the case will be a litigator's delight, rife with disputes over parol evidence, latent ambiguities, good faith, extrinsic evidence, "four corners," and other interpretational issues. But the buyer's calculus is fairly simple: there is surplus out there because it is worth something to buy my way out of this contract, and it is going to cost the supplier something as well. The only relevance of the clarity of the language is not what we might have mutually intended had we engaged in the hypothetical meeting of minds, but the probability she can get some judge or jury to accept the theory. In short, every case of contract interpretation is by philosophical definition an *ex post* exercise in interpretation (i.e., we are not using the words, we are debating their meaning). Because we are supplying the meanings by argument later, every case, to a greater or lesser extent, is a function of *ex post* opportunism,



dictated by the cost of litigation versus the probability that the claim will succeed favorably in dividing up the opportunistic surplus.<sup>87</sup>

In short, in the absence of any empirical evidence (and I am open to suggestions for design of a rigorous experiment to test the proposition), I dispute the existence of a functional relationship between the costs invested in negotiating contracts *ex ante* and the reduction of total social costs (private and judicial) in resolving *ex post* disputes.<sup>88</sup> That function necessarily assumes rule-induction: it claims, as a matter of science, there is a relationship between the rules the parties used in crafting the original language, and those to be used later in disputing its interpretation. I suggest that, unless words have a wholly and clearly prescribed meaning (which can occur), the relationship does not exist, for precisely the reasons stated by Wittgenstein: we read meaning into words based on our bedrock beliefs, and those beliefs will not be established until the dispute, as to which the words will apply, has arisen. On the other hand, the de-linking

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<sup>87</sup> Eric Posner reaches a similar result with a different approach. He hypothesizes that the system of contract law, even if random (or incompetent), has salutary effects in deterring “high value opportunism.” The parties, in essence, agree to the mutually assured destruction of an enforceable contract, even if a result may be random, and this sets the bounds of the game. So the fact we clearly entered into an agreement creates a cost to both parties if a dispute is litigated, and they will find some way to resolve it.

It is as though two parties to a relationship agreed that if they had a dispute, both parties would have a finger chopped off by a government agent. Neither party cheats, because he believes that the other would retaliate by invoking his right to have the mutual sanction imposed. The cheated party will credibly retaliate with a lawsuit, because otherwise he risks obtaining a reputation as a softy, in which case he will be unable to avoid being cheated the next time he plays this game. The government agent's role is just to chop off fingers if one person complains. The government is like a parent, who punishes both children who are fighting rather than only the child who started the dispute. Even if you do not know which child is at fault, you can discourage future misbehavior, for each child knows that he will be punished if he engages in such misbehavior. Like the parent, the government does not have to determine who is right and who is wrong. The purpose of contract law is to enable parties to have the government penalize both if they have a dispute; and contract doctrines merely give parties a reliable way to indicate *ex ante* their desire for such government involvement, and to limit the size and the variance of the penalty to something close to what should be sufficient: a finger rather than a head.

E. Posner, *Radical Judicial Error*, *supra* note 4, at 768.

<sup>88</sup> Posner, *supra* note 2, at 4-5, 36-42.

diminishes the role of intention (whether formalist or contextualist), and leaves open the question what standard should be applied if there is a dispute.<sup>89</sup>

A very recent example of the mental gymnastics, akin to squaring the circle, required when one attempts to put rational bounds around a non-rational process, is Juliet Kostritsky's attempt to develop an economic taxonomy for judicial intervention when contracts are incomplete.<sup>90</sup> To paraphrase Professor Kostritsky's introduction to the problem, simple economic models predict that social welfare is maximized when parties are encouraged to invest in economic activity by entering into and complying with clear contracts. In a perfect world<sup>91</sup> fully explainable by that simple model, courts would do nothing other than ascertain the

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<sup>89</sup> In another recent article, Avery Katz makes the same assumption as Richard Posner: there is a functional relationship between the precision of words used *ex ante*, and the application of those words with precision in the *ex post* dispute. Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496 (2004). He proposes that, rather than wrestling with judge-made or legislative rules on *ex post* contract interpretation, we give the parties *ex ante* the choice of a formalist or contextualist approach to disputes. He observes, presciently, however, that it may be individually rational for the *ex post* litigant to attempt to turn the agreed *ex ante* bargain to its favor. His proposed remedy is simply more words – these limiting contextualist disputes by a restriction *ex ante* to an agreed formalism. I suggest this will not work philosophically because of the infinite regression inherent in interpretation (how do we interpret the agreement to take a formalist position). Cf. PATTERSON, *supra* note 71, at 88. *See also* Charny, *supra* note 63, at 1819 (footnotes omitted):

The law must supply a set of background conditions to interpretation and enforcement of contracts -- commonly referred to as "default rules." Without default rules, *no* contract could have legal effect. This is the case for two reasons. Most fundamentally, no text can completely specify its own means of interpretation. A contractual statement that purported to be such a complete specification would itself have to be interpreted by some set of rules of interpretation. If the text purported to supply those rules, then *those* rules would have to be interpreted, and so on, *ad infinitum*. Thus, the default rules must, at a minimum, contain a set of rules about how the language of contract is to be interpreted.

There is also a pragmatic problem, because intuitively one does not know *ex ante* whether it will be in one's favor to argue contextually or not. Persuasive evidence of this occurs regularly after deal lawyers close a complex acquisition: do we retain the prior draft or not? One can never rationally answer the question, because one never knows whether the drafting history will help or hurt in the particular dispute that happens to arise later.

<sup>90</sup> Kostritsky, *supra* note 14. I believe she reaches something approaching the right answer, but for the reasons I discuss she is struggling terribly with the model.

<sup>91</sup> Professor's Kostritsky's usage, not mine. I am not persuaded that a world explainable by a simple model would be perfect, but I understand the point.

intention of the parties (so as not to undercut the underlying rationale for contracting in the first place, which is to encourage putting investments at risk to create wealth) and enforce it.<sup>92</sup>

It turns out the world is not perfect: it is uncertain. We keep finding instances in which the parties to contracts did not make it known how they wanted their agreement to operate in a later state of this uncertain world. Simple logic tells us that when there is a mismatch between the contract language and the operation of later events, something must have gone wrong. We can either look to the problems inherent in the contract or the problems inherent in the later events. Even if the world is not perfect, we still have a preference, in our model, to assume that we can be rational in our anticipation of the future, because our model continues to require that we be rational in our pursuit of wealth maximization. So, as rational actors, we should be able to write contracts that anticipate all the imperfections. We never do, but we have an explanation: writing contracts like that is very, very expensive, and nobody will pay for it.

When we observe empirically that parties do not seem to be complying with whatever agreements they did write, rather than question the basis for the assumption that the application of contract language to circumstance was a rational process, we look for reasons why it is that the parties failed to live up to the rationally conceived agreement. Moreover, we can coin a term for any post-execution attempt not to live up to the rationally stated intention: opportunism. As Professor Kostritsky observes:

Were it not for uncertainty about the likelihood of and propensity for opportunistic behavior by party, the parties could fully solve and control by contract the propensity of parties to be opportunistic. Absent uncertainty, there would be complete knowledge about the probability of opportunism and the myriad forms it would take. "There could be no asymmetry and opportunism would be known and adequately dealt with by an explicit, fully contingent contract." However, because of uncertainty about the types of behavior affecting

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<sup>92</sup> *Id.*, at 324.

one's counterparty and because of bounded rationality and cost issues, parties do not effectively deal with opportunism by contract.<sup>93</sup>

This uncertainty and opportunism is bad because it devalues the system of contract, which, as we have established, exists to reduce, not heighten the risk of putting investment money at risk.<sup>94</sup>

Here is the problem: fifty pages later, Professor Kostritsky recognizes that the economic model that gives sanctity to the rational intention of the parties would not work in a world substantially affected by the factors of (i) uncertainty, (i) the fact that having contracted, the parties now invest and may have unrecovered costs if they do not go forward with the deal as each imagined it *ex ante*, and (iii) that parties in such circumstance may be prone to try to renegotiate the deal, or worse, find a way out of having to perform (i.e., act opportunistically). And as it turns out, that is exactly how the world works.<sup>95</sup>

I want to suggest an alternative hypothesis. If there appears to be a contradiction between the assumption of rationality of contract, and a world in which the problems with the model subsume the model, perhaps the problem lies not in the world, but in the first assumption.<sup>96</sup> If the negotiation and later application of the words of the contract were not rational processes, there is no problem of opportunism to be solved. If the parties are now in a colorable dispute,

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<sup>93</sup> *Id.*, at 327. The words “bounded rationality” themselves connote the notion that our rationality is merely limited by forces from the outside world; if we could know more, we would be rational with that knowledge. “Bounded rationality refers to human behavior that is ‘intendedly rational only limitedly so’ . . .” OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975), at 21. The term does not contemplate the possibility of circumstances in which we act without *any* rationality.

<sup>94</sup> Kostritsky, *supra* note 14, at 328.

<sup>95</sup> *Id.*, at 367 (“When there is a confluence of all three behavioral characteristics as is often the case in contractual relationships, it becomes difficult to solve problems by contract *ex ante*.”)

<sup>96</sup> Here I hearken back to what passed for philosophy in my youth and the following scene from *Atlas Shrugged*. The heroine has found the last of the great philosophers operating a diner in the Rockies. He tells her, “There is only one helpful suggestion that I can give you: By the essence and nature of existence, contradictions cannot exist. If you find it inconceivable that an invention of genius should be abandoned among ruins, and that a philosopher should wish to work as a cook in a diner – check your premises. You will find that one of them is wrong.” AYN RAND, *ATLAS SHRUGGED* (New American Library, 1957), at 315.

there was never an *ex ante* base line from which one could be opportunistic. Words were never that precise. While judges no doubt need a pragmatic methodology from resolving cases put before them, worrying about the effect on opportunistic behavior is a waste of time. No matter what default rules are imposed, and no matter what the parties do to leave them in place or negotiated out of them, the *ex post* application of the standard will always be an opportunistic act.<sup>97</sup>

#### D. A Language-Game Example

Having now looked at all the theory, I want to examine a real-life example of contract interpretation as language game, in which disputes over contract interpretation arise at the time of the application of the words to a circumstance. A CEO is terminated without cause. His employment agreement was negotiated and signed five years earlier. It lists various payments to be made to the CEO upon his termination without cause. He receives his base pay up through the date of termination. He receives his annual bonus, prorated through the date of termination.

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<sup>97</sup> Dennis Patterson has captured the essence of the fallacy of judging non-cognitive acts from an interpretive standpoint. In critiquing the “interpretative universalism” of Ronald Dworkin and Stanley Fish, he observes:

That theory . . . suggests that our fundamental mode of being-in-the-world – the way in which we continually make sense of the world – is interpretative. From the interpretation of the speech of our fellow humans to deciphering script on a page, we are at every moment engaged in an activity that is profoundly hermeneutic in nature. . . .

This view of the human condition is fundamentally mistaken. It is not by virtue of interpretation that we have a common world. It is not by virtue of interpretation that we have a common world. Rather, we have a world in concert with others because we understand the manifold activities that constitute that world. Catching on to and participating in these activities – knowing how to act – is the essence of understanding.

If understanding is primordial, then interpretation is of necessity a secondary endeavor; the very existence of practices of interpretation is dependent on understanding already being in place. As we saw, interpretation cannot begin where there is no understanding, for every interpretation of a sign simply “hangs in the air” with that which it interprets. *By themselves*, interpretations take us nowhere.

In addition, the company is to pay him “as liquidated damages and not as a penalty” a lump sum of \$5,000,000 (calculated as a multiple of his base pay and bonus).

After the termination, the company’s pension specialist attempts to calculate what his pension benefits will be when he reaches normal retirement age. The employment agreement says that the pension will be based upon “final average pay” as defined in the company’s pension plan. “Final average pay” under the plan is the average annual “pay” for the five highest years of compensation. But for the lump sum termination “liquidated damages,” the CEO’s final average pay would be about \$1,000,000 per year. The lump sum, if included in the calculation, would double the result (\$1.0 million per year plus \$5 million lump sum = \$10 million, divided by five years = \$2.0 million).

The pension specialist now considers whether the lump sum is to be included in the final average pay – i.e., is the monthly pension benefit going to be based on \$1.0 million or \$2.0 million? The pension plan defines “pay” as “a participant’s total direct cash compensation, including bonuses when paid, overtime pay, special allowances or compensation, and any amounts contributed to a 401(k) plan, but does not include income recognized on the issuance or exercise of stock options.”

How does one now determine whether the lump sum, characterized in the employment agreement as “liquidated damages” falls within this definition? Assuming there is no other evidence of any kind on this matter, under the contract written five years earlier, did “compensation” include something called “liquidated damages”? We have learned that words take on shared meanings as part of language games. In some games, like the law of torts,

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Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993). Note the similarity of the allusion to Heidegger’s “ready-to-hand” and “present-at-hand,” *supra* note 35, and accompanying text.

liquidated damages might well be considered “compensation” without dispute. There, calling “liquidated damages” compensation would be as uncontroversial as calling football a “game.” But when we talk about compensation in the context of what people make from year to year, the word might not include a special transfer of funds in the event of a termination that the parties took some pain to characterize as “liquidated damages.”

What was the rule established by the contract, the very thing on which there is no evidence other than the words themselves? Wittgenstein and Kant teach us there is no rule for the application of a rule. Looking backward, now the circumstance is upon us, the problem is over-determination. “Each new application [of the definition of “pay”] we make is a leap in the dark; any present intention could be interpreted so as to accord with anything we may choose to do.”<sup>98</sup> We may see a pattern or a rule in the words of the agreement, and decide that following the rule means “pay” includes any form of compensation, and compensation means anytime you pay money. Under this rule, the final average pay would be \$2,000,000. Or, as legitimately, we may see a rule in the words that says pay is the compensation you get for doing your job, not for relocating your house, or cashing in stock options, or leaving. Under this rule, the final average pay would be \$1,000,000.

Trying to figure out the “correct answer” *ex post*, what the parties intended going forward at the time of the contract, raises the problem of under-determination. As we noted earlier, private language that varies from public language is no language at all (at least that we can verify). As to the possible meanings of the words in public language, the words themselves are not capable of determining, and allowing the rule-followers to know, when they are conforming

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<sup>98</sup> See *supra* note 50 and accompanying text.

to a particular rule established by the words.<sup>99</sup> “Pay” almost certainly would have included base salary, at one extreme, and almost certainly excluded reimbursement for mileage at the other, but all of the other possible applications in between are under-determined.

The lawyers will spin narratives according to the present interest of the parties. The CEO will argue for his interpretation, that it makes more sense to interpret the agreement according to his rule, and the company will argue the opposite, but there is no possible “correct answer” that ties back to a mutual intention of the parties. Moreover, opportunism is relative to one’s initial position. If the CEO privately believed he would get an increased pension benefit on account of the lump sum, an attempt to deny it may appear opportunistic. Conversely, if the company’s human resources director privately believed only ordinary annual compensation, the CEO’s attempt to take an increased pension in addition the huge lump sum might seem opportunistically greedy.

## V. IMPLICATIONS

*Morality.* I believe morality and law each have a role in the making and later disputation of contracts, but the connection is tenuous. The making of the promise (the setting of the rule to be applied in the future) is only the first matter. Our later application of that rule (how do we obey the rule we have set) is a second and different one. If we have a dispute, it is now a matter of interpreting the rule, and that is a wholly different third matter. I can fully expect, if there is a later dispute, each side will argue the other is the one has misinterpreted the rule of the contract has not lived up to the bargain. My expectation of the way we will conduct ourselves is different in each situation.

As noted above, I concur with the image of contract as free and autonomous promise.<sup>100</sup> Indeed, I would supplement that with some Kantian metaphysics. Freedom is an antinomy – I

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<sup>99</sup> See *supra* note 51 and accompanying text.



am subject to both the physical cause and effect of the view, and an autonomous agent with the power to choose to act in a way that transcends physical cause and effect. Because my act of promising (as Fried observes) is the very affirmation of my autonomous self, honoring that promise also takes on some aspect of transcendence. Hence, the categorical imperative: I honor my promises because I would will a universal rule that promises be honored.

I am not so naïve to think, however, that the world operates ideally, and that a starry-eyed recitation of the categorical imperative will end all disputes. The process of agreeing and then transacting at any level of complexity is dynamic through time. As I have made clear, I do not believe any level of pre-contractual negotiation and drafting skill will end disagreements and disputes, because I believe we apply the rules only when faced with the circumstances to which they must be applied. But the fact that you and I have applied the rule differently, and now must enter into an exercise of *ex post* interpretation, does not mean that we also default to the sublimated war of adjudication. It is not merely moral to keep one's promise. It is also moral to understand that one's own understanding may have been flawed, and that the categorical imperative might well impose a universal rule that when there is a dispute, we give some credit to the possibility of an honest misunderstanding by both parties, and to resolve it on that basis. Are you the kind of person, or the kind of business person, who insists on performance, not just to the letter of the deal, but to what you thought the letter of the deal was? Is being right, as opposed to moving on with life, significantly important to you? Do you send back the over easy eggs if they are not precisely to the specification you had in mind but did not articulate? The

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<sup>100</sup> So, apparently, do Schwartz and Scott. They posit two justifications (the second is efficiency, and not relevant here) for having a court find, and the state enforce, the "correct answer" of interpretation: "The first follows from an autonomy based view of contract law. This justification holds that exercise of state coercion against a person must be justified. A sufficient justification is that the court is making the person do what he had agreed to do." Schwartz & Scott, *supra* note 13, at 569. This, of course, assumes away my point, which is that the fact of the dispute means that it is unlikely a court could ever determine what he agreed to do.

process of living one's life so that one finds consensus as opposed to imposing one's will on the other party is beyond the scope of the law.<sup>101</sup>

Here I want to suggest a philosophical thesis I believe may contain the seed of an answer, though perhaps unsatisfying jurisprudentially. The best way to avoid transaction costs in the resolution of a dispute is not to have the dispute or to resolve it quickly and amicably. Under the Habermas theory, most of our contractual relationships do not move beyond communicative action – we perform agreements and rarely reflect on them. When there are disputes and we move to interpretation, successful resolution turns now on our ability to make that interpretation constructive. Here, the very structure of the adjudicative model does not lend itself to constructive (and hence efficient) resolution.

Habermas offered a reason why, as well as an alternative path (however idealized). He criticized the major social theorists for having assumed a relationship between human beings that is subject/object. That is, I, myself, am a subject capable of will and choice. I act on, and, indeed, dominate, objects, like the computer keyboard I am using at this minute. We are capable of seeing other human beings as objects to dominate. Habermas proposed we move from habitualized and normatively maintained language games of communicative action, to discourse, which requires suspending constraints on action and the search for validity.<sup>102</sup> If I see another not

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<sup>101</sup> William Sahlman, one of the deans of entrepreneurial finance, thus contrasts the reaction of unsophisticated and sophisticated investors when a risky start-up venture investment does not progress as anticipated. Unsophisticated investors panic and often refuse to advance additional funds (and no doubt turn to the legal documents to understand their rights). Sahlman prescribes six rules for deal making, five of which are directly applicable here: deals are simple, fair, emphasize trust rather than legal ties, do not blow apart if actual differs slightly from plan, and are written on a pile of papers no greater than one-quarter inch thick. William A. Sahlman, *How to Write a Great Business Plan*, HARV. BUS. REV. 98, 107 (July-Aug. 1997).

<sup>102</sup> HABERMAS, *supra* note 38, at 100.

as an object to be acted upon or dominated, but as another subject, I may well be more inclined to attempt to see the world from the perspective of that other subject.<sup>103</sup>

I suggest both law as a model of behavior and economics as social theory, as applied to adjudication, have the same implicit subject-object assumptions. Resolving a matter at something less than full victory requires letting go, at some moment in the process, of one's insistence on being right, and acknowledging that the other side has a point. Once our relationship has deteriorated to the point that our dispute over interpretation is to be resolved by adjudication, we are no longer in a position of "self/other." We are seeking to dominate, as in war, and the other party is an object.

Habermas postulates what he calls "ideal speech." It is a process of

reaching a mutual understanding discursively. The goal of argumentation is to work through a situation that arises through the persistent problemization of validity claims that are naively presupposed in communicative action. This reflexive form of communication leads to a discursively produced, justified agreement (which of course can settle once again into a traditionally pregiven, secondarily habitual agreement).<sup>104</sup>

While adjudication is certainly preferable to violence as a means of resolving a dispute, it is nevertheless flawed because while discursive, it retains the subject/object component between the parties.<sup>105</sup> In contrast, there is an ideal of negotiated rather than adjudicated resolution in

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<sup>103</sup> *Id.*, at 100-103.

<sup>104</sup> *Id.*, at 100.

<sup>105</sup> See Eric Posner, *Radical Judicial Error*, supra note 4, at 773. ("The rules of dueling, including the use of seconds to intervene, the insertion of elements of chance to even out differences in skill, and the reliance on weapons that reduce the risk and amount of harm, are elements that, like contract doctrine, preserve the deterrent effect of the institution while ensuring that harm does not exceed by too much the amount necessary for this deterrent effect. Contract law is best understood as a modern version of dueling, indeed an improvement insofar as it eliminates the need for violence and physical harm, reduces the variance of the outcome, and reduces the role of factors, like martial skill, that are irrelevant to contracting.").

which the parties act counterfactually to the normal presumptions of habitual and non-reflective action:

We presuppose that subjects can say what norm they are obeying and why they accept this norm as justified. In so doing, we also suppose that subjects to whom we can discursively demonstrate that they do not meet the two above conditions would abandon the norm in question and change their behavior. We know that institutionalized actions as a rule do not correspond to this *model of pure communicative action*, although we cannot help but act counterfactually as though this model were realized. On this inevitable fiction rests the humanity of social intercourse among people who are still human, that is, who have not yet become completely alienated from themselves in their self-objectifications.<sup>106</sup>

There is an interesting development of this thesis in a recent article by Daniel Markovits, the most significant value of which is the view of contract as a subset of all the ways in which we collaborate within a community.<sup>107</sup> In particular, Professor Markovits gets at the philosophical basis for seeing contracting parties not as object-object (the third party external observer perspective), or subject-object (contract as a means by which one ego imposes its will on the other). The argument, invoking Kant's categorical imperative, looks to contract as a means of seeing others as ends, not means, and establishing the Kantian mutually reciprocal "kingdom of ends:"

The parties to contracts, in forming a collaborative community, commit themselves to a mutually responsive, interlocking pattern of intentions in which each takes certain of the other's intentions as end-producing for herself and each gives the other authority over her intentions. A party to a contract engages, therefore, not with the other party's interests as she understands them, but directly

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<sup>106</sup> *Id.* at 102. I had an experience a number of years ago working with an organization, the Alban Institute, which specialized in the mediation of disputes within church communities or congregations (lay-clerical; board-lay; clerical-board). Generally, in those instances, litigation is out of the question, and the organization simply fractures or dissolves if the problems are not resolved through discourse. Of the various styles of managing conflict – persuading, compelling, avoiding/accommodating, collaborating, negotiating, and supporting – Alban associated the appeal to contracts, rules, bylaws (all authorities) most closely with a form of compelling. SPEED B. LEAS, DISCOVER YOUR CONFLICT MANAGEMENT STYLE (Alban Institute, 1997), at 12-17. Compulsion is most often associated with physical force, but the similarity with adjudication is that in each the other being compelled is an object, not a subject.

<sup>107</sup> Daniel Markovits, *Contract and Collaboration*, 113 YALE L. J. 1417 (2004).

with the other party's point of view, as expressed through his contractual intentions, to which she must accommodate herself. Contractual collaboration therefore depends precisely upon a commitment to overcoming egocentrism, at least in the context of the contract. Moreover, insofar as the practice of forming interlocking contractual intentions efficiently serves the (often conflicting) ends that the several parties bring to their contractual relations, contract enlists persons' narrow self-interest in the service of overcoming egocentrism. And finally, in light of my earlier argument that promises and contracts enable persons to cease to be strangers and to attend to their basic needs for community - as expressed in Arendt's idea of "the will to live together with others in the mode of acting and speaking" - contract also enlists persons' broader ethical interests in the service of overcoming egocentrism.<sup>108</sup>

What I would add to this image of contract as constructive subject-subject discourse is the dynamism of the relationship. We cannot merely fix on the collaboration as of the time of the promise-making; we must also focus on mutual accommodation as the contract comes to apply to events of the world.

*Opportunism.* The test of the view of contract as promise or as collaboration or as subject-subject interaction comes when we disagree in good faith about application. We need to separate the morality of promise-making and promise-keeping from the question of resolving disputes if otherwise moral people simply cannot agree about what they promised each other. Moral theory cannot fill in the blanks when the two parties think they agreed to two different things.<sup>109</sup> Treating opportunism as a problem to be solved is misdirected. Opportunism is no more than the present application of the rule to the matter, where someone disagrees with you. If we choose (or are forced to choose by the unreasonableness of the other side) not to resolve the issue on that basis, we have moved beyond the force of morality, and some third party must impose a solution.

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<sup>108</sup> Id., at 1517 (footnotes omitted).

<sup>109</sup> See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) (making the point in criticizing Charles Fried's theory of contract as promise that nothing in the theory speaks to the default rules a court might impose if the parties fail to specify a term).

This accords with how we deal with contract interpretation in real life. We look at the words in the here-and-now, as a given, like the words of a statute or case law, notwithstanding we may have negotiated them ourselves. We assess the probabilities and costs and take a position. In most cases, our discussion of conflicting interpretations never moves beyond us to a third party. Indeed, good lawyers can be heard explaining the reasonableness of the other side's position to their own clients.

The resort to adjudication in real life is (or should be) a matter of significant despair. It is the abandonment of rational discourse in a subject-subject relationship for the attempt to dominate another as an object. It is the abandonment of the normal for the abnormal. The sense of reading the other side's brief in litigation arguing what the words of the agreement really mean is as surreal as Wittgenstein described: "The procedure of putting a lump of cheese on a balance and fixing the price by the turn of the scale would lose its point if it frequently happened that such lumps suddenly grew or shrank for no obvious reason."<sup>110</sup> Opportunism is the charge each party makes against the other to establish its right to victimhood, but it is tautological. What makes it opportunistic is that you want to change what we agreed, but we cannot agree now on what we agreed. The opportunistic party is simply the loser of the argument.<sup>111</sup>

A recent article by Claire Hill and Christopher King comparing American and German law and practice, while relying largely on anecdotal experience, provides an insight into the way

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<sup>110</sup> See *supra* note 46.

<sup>111</sup> I had a partner, since retired, who had a far coarser description for this. His view of contract litigation was that the roles of plaintiff and defendant merely reflected who managed to get to the courthouse first. He believed the first rule of trial strategy, regardless whether you were suing or defending, was to invoke a delicious state of your client's victimization at the hands of the other side (i.e., from the other side's opportunism). Despite the fact he was a graduate of the Harvard Law School, and regularly appeared in listings of the country's finest commercial litigators, his actual description of the strategy was hardly so refined. He trained us young litigators to paint the other side as the "-or," and our client as the "-ee," with the first syllable in each being a word not suitable for inclusion in an academic footnote.

another culture deals with opportunism, and the conclusion is that it is *not* by way of contract.<sup>112</sup>

This is an analysis, based largely on Mr. King's experience as both an American and German lawyer, of how it is that complex business transactions manage, under German law and practice, to be documented in far shorter, more standardized, and less-transaction specific contracts than one normally sees in sophisticated Anglo-American practice. The authors' insight is that American agreements are longer because the American law and culture purport to address opportunism with contract drafting, and German law and culture address it with non-legal norms.<sup>113</sup> Their observation of American practice is consistent with the language theory:

This horror scenario [of having failed to address the issue with drafting] looms large even though the main period with which contracting parties are concerned is the period in which they are getting along and have no need to resort to legal enforcement. During this period, the parties may routinely waive strict adherence to the contract; they may not even consult the contract at all. It is only if the relationship begins to sour - when litigation either is occurring or contemplated - that the actual words of their contract take on paramount importance. And even then, the chance that the actual words will make as great a difference as getting it "exactly right" costs is small.<sup>114</sup>

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<sup>112</sup> Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 69 CHI.-KENT L. REV. 889 (2004).

<sup>113</sup> The authors hypothesize (correctly, in my experience) that deal contracts get longer and longer because provisions go into drafts to address deal-specific issues, those contracts become the form for the next deal, and nothing is ever taken out. *Id.*, at 899. The authors ask:

Why are parties in the U.S. incurring these costs? In our view, parties have gotten locked into an arms race in which each seeks to ferret out the other's possible strategic handles at every turn. The result is U.S.-style extensive custom tailoring of contracts. The participants in the process either believe, or persuade themselves to believe, that "every semicolon matters." The agents involved - the lawyers, answering to their clients, the people representing the clients answering to their seniors - will err on the side of more custom tailoring. Abiding by the norm will never engender criticism, but if there should be a dispute over the contract language later on, not having abided by the norm may very well be punished: could more care have clarified the language sufficiently to avoid the dispute (or to easily prevail at litigation)?

*Id.* at 902 (footnotes omitted).

<sup>114</sup> *Id.*

In German practice, the parties appear to be less opportunistic, not because they have managed to achieve a higher level of draftsmanship, but because the norm is simply to “stop sooner” in the process of customizing agreements.<sup>115</sup> German parties adopt “good enough” provisions, apparently recognizing that agreeing on a tightly-drafted provision is not a reliable way of getting exactly what one wants in litigation anyway.<sup>116</sup> The authors contrast this with the reality of American practice:

Parties to complex contracts in the U.S. can't readily get the benefits of their careful drafting should they go to court. They seek to capture every possible increment of precision; the resultant provisions will often be complex, hard to interpret, and, in spite of the parties' best efforts, susceptible of one or more strategic misinterpretations. Moreover, the more customized the provision, the less likely that it has been interpreted in a prior case; even if there has been a prior interpretation of a comparable provision, the provision may be sufficiently different that the interpretation can be argued not to apply. And the more complex and singular the provision, as customized provisions are apt to be, the more costly the litigation, all else equal.<sup>117</sup>

I disagree with their conclusion only to quibble with the reference to “strategic misinterpretation” which speaks to the power of the illusion of *ex ante* intention. Perhaps an analogy to Einsteinian physics makes the point. Whether something is a misinterpretation, strategic or otherwise, is relative to the position of the interpreter. Usually we agree what the words mean. When we do not, it is easy to conclude from our position that the other parties has engaged in strategic misinterpretation. The answer is, in the case of a good faith dispute, we each applied the contractual text *as practice*, and only in hindsight are arguing *as interpretation* what the rule of the text required. Debating whether that is opportunistic is a waste of time.

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<sup>115</sup> *Id.*, at 903.

<sup>116</sup> *Id.*, at 920-21.

<sup>117</sup> *Id.*, at 919.



*Simplicity and default.* I am more interesting in the process by which lawyers contribute to non-litigated results, so I will briefly comment on several other implications of my view of contracts and the *ex post* application of their words.

1. By and large, we would be no worse off if contracts, even in complex transactions, were simpler rather than more complex, because tight negotiation of complex agreements only fortuitously anticipates the real disputes. You cannot induce meaning of the agreed words in a later context – and interpretations will depend on then existing beliefs – except for those areas the parties know are going to be acted upon. Thus, for example, in an acquisition agreement, I would be inclined to provide detail on the mechanics of the post-closing adjustment,<sup>118</sup> but keep the environmental representation brief and to the point.<sup>119</sup>

2. The Coase theorem says that with clear default rules and no transaction costs, the parties will achieve an efficient result. The setting of default rules, like those in the U.C.C., even for complex transactions, like a uniform merger and acquisitions code or a uniform venture capital code, would make sense, but I am afraid hundred of years of common law, rather than civil law culture makes the suggestion impractical.<sup>120</sup>

*Adjudication.* I confess a moderate amount of indifference as to the standard of decision once the matter has gone to litigation, and leave the matter for others to contemplate. Some

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<sup>118</sup> This is the provision of an acquisition agreement under which the buyer and seller may adjust the purchase price to account for increase or decrease in the value of the net assets (or some portion thereof) between an agreed reference date and the date of the closing.

<sup>119</sup> For example: “Except as set forth in the disclosure schedule, the operations of the Seller are, and have been, in compliance with, and the Company is not the subject of any adjudicative proceedings or settlements involving, any environmental law.”

<sup>120</sup> See Hill & King, *supra* note 112, at 921-25, where the authors consider the reasons why adoption of German-style default standards would be difficult in the United States.

default standard based on economic efficiency<sup>121</sup>, or imposing cost on the party best able either to bear it or to have avoided it, seems as reasonable a standard as any. I come full circle to the essential pragmatism, under the sorry circumstances of dispute, of Holmes, Posner and Patterson: the right solution in that circumstance is one that works. Indeed, Patterson's call for pragmatic adjudication, without regard to interpretation, works for matters of contract interpretation:

As we have seen, interpretation no more secures the meaning of law than clear and distinct ideas underwrite belief. There is nothing more to be said about the truth of a proposition of law than advancing the reasons for its assertion. Real advances will come in jurisprudence when we realize that law needs no foundations, interpretive or otherwise, and that the central task of jurisprudence is the perspicuous description and critical appraisal of our practices of legal justification.<sup>122</sup>

There is equally nothing more to be said about the truth of a disputed contract language other than advancing reasons for the assertion of a result. The central task of this jurisprudence is to stop looking for the illusory intent, and get on with creating a pragmatic result.<sup>123</sup>

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<sup>121</sup> See Craswell, *supra* note 109.

<sup>122</sup> Patterson, *Interpretative Universalism*, *supra* note 97, at 56 (footnotes omitted).

<sup>123</sup> Other scholars have articulated adjudicative approaches that do not rely on my application of language theory to deconstruct the idea of mutual intention, but the solutions are consistent. See, e.g. Zamir, *supra* note 11. In advocating an inversion of the conventional hierarchy of interpretation away from reliance on mutual intention, Professor Zamir recognizes that, during the performance of the agreement, parties act according to various long-term and short-term incentives, not necessarily consistent with the obligations under the agreement. *Id.*, at 1771-77. Hence, he concludes, on several bases, that the process of interpretation should start from the "end" (i.e., default rules, trade usages and social norms) and "not give priority to the sources closer to the actual intentions of the parties." *Id.* at 1802. I believe this is the right result, but for the wrong reason. His error is to assume either that the words of the agreement had a meaning at the time of its execution and, hence, there was a mutual intention, or if not, then other non-legal sanctions and incentives (like trust, fear of reputation loss, etc.) may operate to resolve later arising disputes over interpretation. The implication of my theory is that an inversion of the interpretive hierarchy is perfectly reasonable as a basis for deciding cases, but that the extensive justification for disregarding the *ex ante* illusory intention is unnecessary.

Another scholar has recently argued that Williston himself would concur in a "rough-and-ready" pragmatism on issues of contract interpretation. Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. (forthcoming 2004), available at <http://ssrn.com/abstract=602004> ("... Williston's scholarship shares some important affinities with what [Richard] Posner call 'everyday pragmatism' in law, an approach that rejects abstract speculation and theoretical subtlety in favor of rough-and-ready solutions to legal problems. . . . [O]ne discovers that Williston and Posner agree on some central jurisprudential claims: the irrelevance of metaphysics, the reliance on common-sense judgment, and the insistence on real-world feasibility.")

## VI. CONCLUSION

Law conceived of as science, at least in the *ex post* interpretation of contracts, attempts to impose a rational construct around a subject based in the use of language usage that even if rational is not cognitive and not reflective. I have contended this is not possible: philosophers have shown that our use of language is not a cognitive, reflective or rational process. We apply words to circumstances reflexively, at the time they need to be applied, and more often than not, we are playing the same language game. We understand what we meant (or close enough) and life goes on without the intervention of lawyers. The process of interpretation is the exception: whether in the work lawyers do at the time of the agreement or *ex post* in the most pathological (yet civilized) form of disputed interpretation: litigation.

I want to suggest there is an ironic conflict of idealism going on here. Economic theory as applied to contract interpretation (and I believe this is true whether it is based in rational actor theory, behavioral economics or institutional economics) is based on an underlying ideal of science: if we understand the cause of the disease (misunderstanding, opportunism, sloppy drafting, failure to incur sufficient cost) and its effects, we can cure the problem. In this

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Judge Posner's own statement on that approach seems sensible to me:

A neglected point against formalism in legal systems in which the judges have some feel for commercial realities is that businessmen are not literalists. They do not have the lawyer's exaggerated respect for the written word and thus do not expect bizarre consequences to follow from mistakes in drafting. There is frequent conflict between lawyer and client over how detailed a contract should be, the former pushing for the inclusion of endless protective clauses and the latter worrying that pressing for such clauses will not only protract negotiations and increase legal fees but also make him seem a sharpie and kill the deal. Better that the contract should be kept reasonably short and that if an unforeseen contingency arises it should be resolved in a commonsensical fashion. It is rather reassuring than otherwise to think that if one's contract should come to grief the court will straighten matters out in a "reasonable" way rather than by recourse to legal technicalities. Businessmen would, I am speculating, like judges to resolve interpretative issues the way a reasonable businessman would.

Posner, *supra* note 2, at 34-35 (footnote omitted). This is certainly more pragmatic than the Schwartz and Scott approach by which a court is supposed to look for the "correct answer" in the parties' mutual intention.

instance, the ideal is to eliminate conflict and its inefficient cost as much as possible, whether *ex ante* or *ex post*. The particular perspective of economic jurisprudence is *ex post*, and looks to articulate rules by which we either reduce the *ex post* cost given the existence of a dispute, or better yet, tell the parties what the rules will be so they anticipate them *ex ante* and avoid the dispute. Or that jurisprudence seeks to predict in game theoretic models how parties are likely to react in a given situation and to engineer rules that tilt the game to an efficient result.

I, on the other hand, have an ideal of behavior that is based in some notion of transcendental rules and imperatives accessible by reason, and not necessarily co-terminal either with what is legal or what maximizes wealth. One of those is the sanctity of agreement, but the other is a recognition the world changes, and how we mutually expect our agreement to be enforced may also change. If I have given you an expectation of some kind of performance, I do not expect to get out without paying for the privilege. Most of the time we agree on an accord and satisfaction from the original agreement and we move on. But I do not have an ideal of human perfectibility, and accept the possibility we may not see the application of our prior words to current circumstances in the same light. Hence, I have no illusion about creating a legal model that is based on an underlying assumption that perfect knowledge and rationality will eliminate conflict. In my experience, that is not the way the world works. I hope instead the inevitable conflict is resolved as reasoned discourse, between parties who recognize each other as rational subjects, and not objects to be dominated.

Science assumes there is a correct answer. I am not so sure. As I have said before: our sense of the Golden Rule (a subset of Kant's categorical imperative) not only provides a moral basis for avoiding false promises, but keeps us from requiring a correct answer or a full victory, even when we have a basis for it. That is something to teach new lawyers.

